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Ombudsman's Determination

Applicant	Mr N
Scheme	Hoover (1987) Pension Scheme (**the Scheme**)
Respondents	The Hoover Trust Fund (1987) Limited Trustees Limited (**the Former Trustee**) Hoover Limited (**Hoover**)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by Hoover or the Former Trustee.

Complaint summary

2. Mr N's complaint is that he has lost pension benefits to which he was entitled under the Scheme when it entered the Pension Protection Fund's (**PPF**) assessment period.

Background information, including submissions from the parties

3. On 2 December 1963, Mr N started working for Hoover and was required to join the Scheme as a condition of his employment. In 2004, at age 60, after 40 years' service, he accepted redundancy and began receiving his pension.

4. In December 2016, the Former Trustee informed all members that the Scheme was materially underfunded and, as at March 2016, the buy-out deficit was £500 million and the PPF deficit was £300 million.

5. On 31 May 2017, Hoover, the Former Trustee, the PPF and The Pensions Regulator (**TPR**) entered into an agreement called a regulated apportionment agreement (**RAA**). The purpose of this statutory arrangement was to allow Hoover to continue trading and avoid insolvency whilst responsibility for funding the Scheme was taken over by another group company. The terms of the RAA required the group company to pay £60m into the Scheme and involved Hoover granting the Scheme a 33% share in its business in return for the PPF taking on the Scheme's liabilities.

6. TPR issued a regulatory intervention report under section 89 of the Pensions Act 2004 (**PA 2004**). This explained that the RAA, though rare, was appropriate as it enabled Hoover to avoid inevitable insolvency within the next 12 months and so gave a better outcome for Scheme members.

7. TPR noted that the Former Trustee had received independent financial advice that the RAA proposal was preferable to insolvency because it involved an upfront cash payment that would benefit the Scheme and allow Hoover to continue trading. TPR added that the increased funding under the RAA was not enough to adequately fund Scheme benefits above the minimum level required by legislation (**PPF benefits**) and so the Scheme was required to enter a PPF assessment period.

8. On 1 June 2017, the Scheme entered the PPF assessment period and HR Trustees Limited (**the New Trustee**) was appointed to administer the Scheme. The New Trustee confirmed that all members would continue to receive benefits in accordance with the Scheme's Deed & Rules dated 10 April 2001 (**the Rules**), as at 1 June 2017, subject to PPF benefits levels. It enclosed a guide that explained how PPF benefits would be calculated, including pension increases.

9. In October 2017, Mr N complained to Hoover and the Former Trustee about the level of increases that his pension would receive and asked it to:

   - Clarify the rule that did not allow the Scheme to pay pension increases for pre 6 April 1997 service, even though he had accrued many years' service before 1997.

   - Explain why his pension did not increase for a full year on 1 January 2018, as required under the Rules, and why the New Trustee had excluded an increase from 1 January to 1 June 2017, the date when the Scheme entered the PPF assessment period.

   - Explain why his employment contract did not guarantee him a right to full pension increases, when Hoover had required him to join the Scheme as a condition of employment.

10. On 20 October 2017, the Former Trustee and Hoover replied to Mr N. Its main points were:-

    - PPF rules require benefits to be paid at a certain level during the assessment period, based on the Rules as at 1 June 2017, including increases.

    - Hoover did not guarantee Scheme benefits in his contract of employment but required him to join the Scheme, subject to its Rules. The Rules were subject to PPF benefits levels during the PPF assessment period.

    - Entering the PPF assessment period in accordance with the RAA was the best outcome for the Scheme, when it was underfunded, as members would receive at least PPF benefits.

11. On 26 June 2018, Mr N asked for full pension increases or compensation and said:-

- He should be entitled to an increase in his pension for the period 1 January to 31 May 2017, under the Rules, as the Scheme was still under the control of Hoover.
- His service before 1997 has been ignored under PPF rules which is a considerable and unfair penalty for him, as most of his service was before this date.
- A letter and statement provided by the Scheme, dated 19 May 2004, stated that, once in payment, his pension would be increased (a) in line with increases in the Retail Price Index (**RPI**) up to a maximum of 5% a year and (b) a minimum of 3% for pensionable service prior to July 2002, and (c) in line with RPI increases only, for pensionable service from 1st July 2002. The letter then stated that this pension would be paid for the rest of his life. Later statements confirmed this.
- He said, "I do not believe my case can be considered fair or legal".

12. On 5 July 2018, Mr N complained under the Scheme's internal dispute resolution procedure (**IDRP)** and said:-

- He was disappointed and felt let down because Hoover had agreed, in his contract of employment ,to pay Scheme benefits for 34 years' service, but they had been reduced.
- He was not sure how fully TPR and Hoover had considered these facts before agreeing the RAA.
- He asked for reinstatement of his benefits in full or, alternatively, compensation.

13. On 26 October 2018, the New Trustee rejected his complaint under the IDRP and explained that:

- Once the Scheme entered the PPF assessment period, it could only pay benefits and pension increases in accordance with the law governing the PPF.
- Under the PPF's rules pensions earned after 6 April 1997 would increase each year in accordance with the statutory basis, the consumer prices index (**CPI**), up to a maximum of 2.5%, but no increase on pension earned before 6 April 1997, was permitted.
- Pension increases applied on 1 January each year under the Rules. The first increase, when the Scheme was in the PPF assessment period, was calculated, under the PPF rules, on a proportionate basis for the period 1 June 2017 to 31 December 2017.
- Mr N's contract of employment was not a matter for the New Trustee to consider, but for Hoover.

14. In response to Mr N's complaint, the New Trustee and Hoover replied

"Whilst we do sympathise with Mr N's position, we were only able to calculate and pay benefits in line with the law governing the compensation payable by the PPF. The legislation does not allow or refer to Scheme benefits applicable prior to the PPF assessment date. As the next pension increases exercise would have taken place within the PPF assessment period, we were unable to consider Scheme benefits, in this instance."

15. Extracts from the legislation are set out in Appendices 1 and 2, and extracts from the Scheme Rules are set out in Appendix 3.

16. In May 2019, the Scheme transferred into the PPF with a transfer notice issued under section 160 PA 2004. Consequently, the New Trustee was discharged from its pension obligations.

Adjudicator's Opinion

17. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Former Trustee or Hoover. The Adjudicator's findings are summarised below:-

- Once the Scheme entered the PPF assessment period, it had to provide increases that were permitted by the PPF, despite previous statements that Mr N had received about Scheme pension increases he would receive.

- In accordance with PPF legislation, the Scheme was correct to increase Mr N's pension on 1 January 2018, calculated from the date the Scheme entered the PPF assessment period. This was 1 June 2017 and not 1 January 2017.

- The Scheme was also correct to apply pension increases only for post April 1997 service, in accordance with PPF legislation, even though most of Mr N's pensionable service accrued before this date.

- Mr N's real complaint was about the restrictions on benefits under the PPF, not the Former Trustee's or Hoover's decision to agree to the RAA and allow the Scheme to enter the PPF assessment period.

- The Adjudicator noted that I myself do not have power to direct the Scheme to provide pension increases above the PPF legislative requirements, even if they appear unfair.

18. Mr N did not accept the Adjudicator's Opinion and in response said:

"From the beginning of my complaint I never for one-minute thought that whoever was responsible at any particular time in the process broke any rules. As I have said to you that although disappointed with your reply I was not surprised. My theme throughout has been based on fairness and to an extent discrimination to which you say the Ombudsman cannot decide. I find that difficult to accept when my case is built around a financial contract that I entered and did not default at any time over 40 years. For the word "fairness" maybe I should substitute "wrong" As I have said somewhere along the road there has been a "breach" and I am on the wrong end of that".

19. As Mr N did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mr N's submissions do not change the outcome of his complaint. I agree with the Adjudicator's Opinion and I will therefore only respond to the points made by Mr N for completeness.

Ombudsman's decision

20. Mr N's complaint is that he has been treated unfairly because Hoover, TPR and the Former Trustee agreed that the Scheme should enter the PPF's assessment period, with the result that his benefits had to be reduced. In particular, he complained that:-

- He has been denied pension increases relating to his pre 1997 service (34 out of 39 years' service) that he was entitled to under the Scheme Rules and were promised to him in annual statements.
- He has been denied a pension increase from January to May 2017, because the Scheme entered the PPF assessment period on 1 June 2017.
- He had been denied a contractual right to a full pension for his period of service, even though Hoover had required him to join the Scheme as a condition of his employment.
- The Former Trustee, Hoover and TPR, should not have allowed the Scheme to enter a PPF assessment period without taking account of his position and planning to compensate him for the loss of his full pension benefits.

21. I have considered the relevant legislation and the Scheme Rules, extracts of which are set out in Appendices 1 to 3. I find that Mr N's pension has been increased correctly, in accordance with legislative requirements for the PPF. This includes both his pre 1997 service and the period from 1 January 2017 to 1 June 2017, when the Scheme entered a PPF assessment period.

22. After entering a PPF assessment period, the Scheme became bound by the legislation that governs the PPF. Under such legislation, the PPF was not required to provide a full 12 months' increase to Mr N's pension between 1 January 2017 and 1 January 2018. This was the case, despite previous statements, informing him of the increase applicable to his pension under the Rules.

23. I also consider that Mr N did not have a contractual entitlement to a full pension. His Scheme membership was subject to the Scheme Rules, including the requirement to provide PPF benefits, if the Scheme were to enter the PPF assessment period.

24. There is no evidence that Hoover, the Former Trustee or TPR acted contrary to the interests of members of the Scheme when it entered a RAA and, ultimately, the PPF. Although benefits, including pension increases, are lower for Mr N under the PPF,

this avoided insolvency and the winding up of the Scheme, with potential loss of pension benefits. The Former Trustee also took financial advice that confirmed that, in order to avoid insolvency, it would be in members' interest to sign the RAA and enter the PPF with its statutory limitations on benefits.

25. The New Trustee was given a statutory discharge from its pension obligations under Section 161 of the PA 2004, when the Scheme was accepted into the PPF. There is also an exoneration clause in the Scheme Rules that protects the New, and the Former Trustee, from liability if the Scheme cannot provide full benefits. I do not find that the Former Trustee, or indeed, the New Trustee are responsible for any losses that Mr N believes he has incurred.

26. I note the recent judgment of the European Court of Justice (**ECJ**), delivered in Pensions-Schering's-Verein VA v Günther Bauer (Case C-168/18), in December 2019 (**Günther Bauer**). This case concerned the minimum level of pension protection that must be afforded to members of pension schemes in Germany on the insolvency of their employer under the Insolvency Directive *[2008/94/EC]*.

27. The ECJ held that reductions in benefits paid to former employees on a company insolvency could contravene the Insolvency Directive and be "manifestly disproportionate", if they put the member below an EU member state's poverty threshold. However, it said "member states have considerable latitude in determining both the means and the level of protection of employees' accrued entitlements to old-age benefits". It added that the current law cannot, therefore, be "interpreted as requiring a full guarantee of the rights in question."

28. I have not considered whether Mr N is placed below the poverty threshold as a consequence of receiving benefits in accordance with the PPF legislation. Mr N has not raised this question with the PPF, nor does it form part of his complaint to my office. Further, any dispute as to the level of benefits that members are entitled to under a pension scheme admitted to the PPF would be a matter to raise, in the first instance, with the PPF through its internal procedure.

29. I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman
30 March 2020

Appendix 1

Review of legislation – pension increases in the PPF Assessment Period.

Pensions Act 2004

Section 138 Payment of scheme benefits

(1) Subsections (2) and (3) apply where there is an Assessment Period in relation to an eligible scheme.

(2) The benefits payable to or in respect of any member under the scheme rules during the Assessment Period must be reduced to the extent necessary to ensure that they do not exceed the compensation which would be payable to or in respect of the member in accordance with this Chapter if:

(a) the Board assumed responsibility for the scheme in accordance with this Chapter, and

(b) the assessment date referred to in Schedule 7 were the date on which the Assessment Period began.

Schedule 7, paragraph 28.

(2) Where a person is entitled to periodic compensation under any of those paragraphs, he is entitled, on the indexation date, to an increase under this paragraph of:

(a) the appropriate percentage of the amount of the underlying rate immediately before that date, or

(b) where the person first became entitled to the periodic compensation during the period of 12 months ending immediately before that date, 1/12th of that amount for each full month for which he was so entitled.

(3) In sub-paragraph (2):

"appropriate percentage" means the lesser of—

(a) the percentage increase in the retail prices index for the period of 12 months ending with the 31st May last falling before the indexation date, and

(b) 2.5%.

"indexation date" means:

(a) the 1st January next falling after a person first becomes entitled to the periodic compensation, and

(b) each subsequent 1st January during his lifetime;

"underlying rate" means, in the case of periodic compensation under any of the paragraphs mentioned in sub-paragraph (1), the aggregate of:

(a) so much of the amount mentioned in sub-paragraph (3)(a) of the paragraph in question as is attributable to post-1997 service, and

(b) the amount within sub-paragraph (3)(b) of that paragraph immediately the indexation date.

(periodic compensation is how legislation describes the pension payable to members, and the entitlement begins at the Assessment Date).

Note

Paragraph 3 of Schedule 7 of the Pensions Act 2004 sets out the pension liability at the Assessment Date in respect of pensions in payment. The annual rate of pension from the PPF is the appropriate percentage of the aggregate of (1) the protected rate of pension and (2) any increases under paragraph 28. The protected rate of pension will be the rate of pension in payment at the Assessment Date and the appropriate percentage is either (i) 100% if passed normal retirement age or (ii) 90% if normal retirement age has not been attained.

Appendix 2

Liability on entering the PPF

160 Transfer notice

(1) This section applies where the Board is required to assume responsibility for a scheme under section 127, 128, 152 or 158.

(2) The Board must give the trustees or managers a notice (a "transfer notice").

(3) In a case to which section 127 or 128 applies, a transfer notice may not be given until the valuation obtained under section 143 is binding.

(4) In a case to which section 158 applies, a transfer notice may not be given until the valuation obtained under subsection (3) of that section is binding.

161 Effect of Board assuming responsibility for a scheme

(1) Where a transfer notice is given to the trustees or managers of an eligible scheme, the Board assumes responsibility for the scheme in accordance with this Chapter.

(2) The effect of the Board assuming responsibility for a scheme is that:

(a) the property, rights and liabilities of the scheme are transferred to the Board, without further assurance, with effect from the time the trustees or managers receive the transfer notice,

(b) the trustees or managers of the scheme are discharged from their pension obligations from that time, and

(c) from that time the Board is responsible for securing that compensation is (and has been) paid in accordance with the pension compensation provisions,

and, accordingly, the scheme is to be treated as having been wound up immediately after that time.

(3) In subsection (2)(a) the reference to liabilities of the scheme does not include any liability to, or in respect of, any member of the scheme, other than—

(a) liabilities in respect of money purchase benefits, and

(b) such other liabilities as may be prescribed.

(4) In subsection (2)(b) "pension obligations" in relation to the trustees or managers of the scheme means—

(a) their obligations to provide pensions or other benefits to or in respect of persons (including any obligation to provide guaranteed minimum pensions within the meaning of the Pension Schemes Act 1993), and

(b) their obligations to administer the scheme in accordance with the scheme rules and this or any other enactment.

162 The pension compensation provisions

(1) Schedule 7 makes provision for compensation to be paid in relation to a scheme for which the Board assumes responsibility in accordance with this Chapter, including provision for—

(a) periodic compensation to be paid to or in respect of members,

(b) lump sum compensation to be paid to members,

(c) a cap to be imposed on the periodic compensation and lump sum compensation payable, and

(d) annual increases to be made to periodic compensation.

(2) In this Part references to the pension compensation provisions are to the provisions of, and the provisions made by virtue of, this section, sections 140 to 142, 161(2)(c), 164 and 168 and Schedule 7.

163 Applications and notifications for the purposes of section 128

(1) Where the trustees or managers of an eligible scheme become aware that:

(a) the employer in relation to the scheme is unlikely to continue as a going concern, and

(b) the prescribed requirements are met in relation to the employer,

they must make an application to the Board for it to assume responsibility for the scheme under section 128.

(2) Where the Board receives an application under subsection (1), it must give a copy of the application to:

(a) the Regulator, and

(b) the employer.

(3) An application under subsection (1) must:

(a) be in the prescribed form and contain the prescribed information, and

(b) be made within the prescribed period.

(4) Where the Regulator becomes aware that:

(a) the employer in relation to an eligible scheme is unlikely to continue as a going concern, and

(b) the requirements mentioned in subsection (1)(b) are met in relation to the employer, it must give the Board a notice to that effect.

(5) Where the Board receives a notice under subsection (4), it must:

(a) give the trustees or managers of the scheme a notice to that effect, and

(b) give the employer a copy of that notice.

(6) The duty imposed by subsection (1) does not apply where the trustees or managers of an eligible scheme become aware as mentioned in that subsection by reason of a notice given to them under subsection (5).

(7) The duty imposed by subsection (4) does not apply where the Regulator becomes aware as mentioned in that subsection by reason of a copy of an application made by the trustees or managers of the eligible scheme in question given to the Regulator under subsection (2).

Appendix 3

Summary of relevant provisions of Scheme Trust Deed & Rules dated 10 April 2001 and a relevant extract

Part 4 of Schedule 1 describes the increases that should be paid by the Scheme on pensions in payment. It notes that: "All pension allowances (other than Guaranteed Minimum Pensions and pensions attributable to the AVC Fund) shall be increased on 1st January each year." The increase is only payable at 1 January and there is no entitlement to a proportion of the increase before this date.

Even if the Trustees had wanted to augment the pensioners' benefits by providing additional pension equivalent to a proportionate pension increase in respect of the period 1 January to 30 June, they would not have been allowed to because as soon as the Scheme enters the Assessment Period, it must only pay the PPF level of benefits.

Clause 8, Schedule C

The Trustees shall not be liable if the Fund is insufficient to pay the benefits under the Scheme whether by reason of the contributions payable by Employers being insufficient or by reason of the Employers failing to pay the contributions …or for any other reason.