

Ombudsman's Determination

Applicant	Mr L
Scheme	Sappi UK Pension Scheme (the Scheme)
Respondent	PAN Governance LLP (PAN)

Outcome

1. I do not uphold Mr L's complaint and no further action is required by PAN.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr L's complaint is that the index used for pension increases has changed from the Retail Prices Index (**RPI**) to the Consumer Prices Index (**CPI**).

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

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

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

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

5. General Rule 25, 'Inland Revenue Limits' states:

"Post retirement increases:

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

'Index' is defined as:

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

The Scheme's Definitive Trust Deed and Rules, dated 27 May 2005

6. Rule K.1.1. 'Pension Increases' states:

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

7. Schedule 3, 'Definitions' states:

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

8. Schedule 5, 'Inland Revenue limits', states:

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

Background information, including submissions from the parties

9. In 1991 Mr L consented to the transfer of his benefits from the DRG Pension Fund to the Scheme. Prior to the transfer he received a letter from the Scheme's Group Administration Manager:

"If you are currently a member of the DRG Pension Fund and consent to transfer your benefits to the SAPPI Scheme, I can confirm that:

(i) Your future benefits under the SAPPI Scheme will mirror those which you are currently enjoy under the DRG Pension Fund,..."

10. In 2005 Mr L received a retirement quote stating that his pension would increase in accordance with the Scheme Rules:

- from retirement date to State Pension Age at 5% or RPI, if lower; and
- from State Pension Age at 5% or RPI, if lower, for benefits in excess of GMP and at 3% or RPI, if lower, on post 6 April 1988 GMP.

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

12. Mr L duly received an explanatory Booklet (the Booklet) and was notified that Workplace Solutions had been employed to give advice. The Booklet stated under 'Inflation Index' that currently the inflation index used for most purposes in the Scheme was RPI, but that this might change.
13. Mr L accepted the PIE option.
14. Subsequently the Principal Employer approached PAN about using CPI in place of RPI as the reference index for increasing pensions in payment under the Scheme. After obtaining legal and actuarial advice PAN concluded that CPI was a more appropriate inflation index for determining future pension increases. An announcement was issued to Scheme Members.
15. Mr L unsuccessfully complained about the index change via the Scheme's internal dispute resolution procedures.

Mr L's position

16. Mr L says:-
 - The Scheme Members should have been consulted about the Rules change from RPI to CPI.
 - Prior communications to him had established RPI as the 'norm' applying to his pension.
 - While the Booklet mentioned that the inflation index used by the Scheme may change it did not say to what or when and it was not highlighted to him by any financial adviser. The figures he received from Workplace Solutions pertaining to the PIE option confirmed future pension increases at RPI.
 - He will suffer a financial loss by the application of CPI to increase his pension in payment.

PAN's position

17. PAN says:
 - Leading Counsel advised PAN:
 - The phrase 'Retail Prices Index' is not used literally in the Scheme Rules, but as a term of art, and so it includes the full extent of the wording used in the Scheme Rules definition of RPI.
 - In accord with the High Court's decision in *Arcadia Group Ltd v Arcadia Group Pension Trust Ltd* [2014] EWHC 2683 (Ch) (31 July 2014), (**Arcadia**) (see paragraph 18 below), the Scheme Rules contain (through the definition of RPI) an implicit power of selection requiring a decision to be made about the appropriate index that should be applied.

- On consideration of the Scheme Rules as a whole, there is a strong argument in support of the Principal Employer holding the power of selection unilaterally, without the requirement for a Trustee decision. However, it would be a safer course of action to assume that the power of selection is to be exercised jointly by the Principal Employer and the Trustee.
- The consultation requirements under the Pensions Act 2004, were not necessary as there were no “affected members”, as defined in the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.
- PAN’s Leading Counsel’s advice set out the appropriate decision-making process, and considered all the relevant factors, both in favour and against a switch from RPI to CPI.
- There was no amendment made to the Scheme Rules as they already contained an implicit power of selection. Consequently, members consent to the switch from RPI to CPI was not required.
- Scheme communications defer to the governing Scheme Rules. The Booklet stated that the inflation index used by the Scheme could change in the future. Therefore, PAN disagrees that Scheme communications established RPI as a norm.
- PAN recognises that it is likely that future pension increases will be lower than if RPI had been retained. However, it felt there were good reasons in favour of the switch to CPI, including improved security of benefits, certain well-published defects in the RPI methodology and the Principal Employer’s chosen deferred remuneration policy.

Adjudicator’s Opinion

18. Mr L’s complaint was considered by one of our Adjudicators who concluded that no further action was required by PAN. The Adjudicator’s findings are summarised below:-

- From 6 April 2011, the Secretary of State changed statutory revaluation from RPI to CPI.
- Whether a scheme can base future increases on CPI depends on the rules of the scheme. For example, if the scheme’s rules refer to the statutory increase revaluation the trustees are obliged to change to CPI. However, where a scheme’s rules specifically refer to increases in line with RPI, then whether it is possible to amend the scheme rules depends upon the wording of the increase rule and any other applicable rules. There have been several recent cases concerned with the interpretation of different pension increase rules and whether it is possible, in each case, to either retain RPI or change to CPI.

- In the Arcadia case, the sponsoring employer argued that it was implicit in the definition of RPI that there was a power to select another index.
- The case concerned the Arcadia Group Pension Scheme and the Arcadia Group Senior Executives Pension Scheme. Both schemes used similar definitions of RPI. The first defined RPI as the Government's Index of Retail Prices or any similar index satisfactory for the purposes of HMRC. The second had the same definition but with Inland Revenue mentioned in place of HMRC.
- Mr Justice Newey noted that HMRC had confirmed that CPI would be a satisfactory index for pensions in payment and could not see any basis on which HMRC could consider CPI to be anything but satisfactory for its purposes as regards revaluation. Mr Justice Newey concluded:-
 - Both definitions did confer powers to select an alternative index. He reasoned that there had to be some power of selection in case, for example, RPI was discontinued. Furthermore, the definitions expressly allowed for the possibility that another index be adopted and did not state that this would only be permissible if RPI was discontinued or replaced.
 - The power to make the change was vested in the Employer and Trustees jointly.
 - Section 67 of the Pensions Act 1995 did not preclude the selection of CPI for use in connection with benefits derived from past service.
- The Scheme Rules define RPI as "the Index of Retail Prices published by the Central Statistical Office of the Chancellor of the Exchequer or any index which is accepted by the Commissioners of Inland Revenue for this purpose".
- Mr Justice Newey's judgment makes it clear that CPI can be used and that its selection is not unreasonable.
- The decision to change the index used for pension increases from RPI to CPI was jointly agreed between the Principal Employer and PAN. PAN took legal advice before deciding that the switch was appropriate.
- There was no requirement for the Principal Employer and PAN to obtain members prior consent to the change as the Scheme Rules definition of RPI conferred powers to select an alternative index. An amendment to the Rules was not required.
- RPI is not an absolute measure of price inflation, both RPI and CPI are just two of a variety of structured indices that differently measure price inflation, with RPI increases likely to be higher.
- Statements in documents regarding the use of RPI was given for information only, and there was no indication or promise that RPI was the measure which would always be used.

- There is no evidence that Mr L is being discriminated against by the index change from RPI to CPI for pension increases.
19. Mr L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr L provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr L for completeness.

Ombudsman's decision

20. Mr L says he has not seen the Scheme Rules and as far as he can tell TPO are taking PAN's word as to what they say and whether RPI is used as a 'term of art' or whatever that means.
21. Relevant extracts from the Scheme Rules are included above.
22. Mr L raises the point that if it was so important to change to CPI why was this not done by the Trustees prior to the appointment of PAN? This, however, is not relevant to the question of whether the Scheme Rules allow the reference index to be changed from RPI to CPI; I am satisfied that it does.
23. Mr L has submitted two documents. The first issued in 1991 states:
- "your future benefits under the SAPPI Scheme will mirror those which you currently enjoy under the DRG Pension Fund".
24. Mr L says as far as he is aware in 1991 there was only one index used, RPI, so there must have been a rule change sometime later.
25. The second document, part of a letter issued in 2004, states:
- "Once your pension becomes payable it will be increased on 1 April each year by:-
5% or the Retail Prices Index if less."
26. Mr L says communications he received from 2004 prior to the change of index informed him that his pension would increase by 5% or RPI if less.
27. Mr L says PAN's report for the period 6 April 2017 to 5 April 2018, shows that the Scheme was fully funded to 106%
28. The Rules of The DRG Pension Fund state that post retirement increases are "in proportion to the increases in the Index or, if greater, at the rate of three per cent per annum compound." 'Index' is defined as: "the Index of Retail Prices published by the Department of Employment or any other official cost-of-living selected by the Trustee Company and approved by the Board of Inland Revenue."
29. The Rules of the Scheme define RPI as "the Index of Retail Prices published by the Central Statistical Office of the Chancellor of the Exchequer or any index which is accepted by the Commissioners of Inland Revenue for this purpose".

30. The decision to change the index used for pension increases from RPI to CPI was jointly agreed between the Principal Employer and PAN.
31. CPI comes within the definition of “Retail Prices Index” under both sets of Rules. CPI is an index used to measure price increases and is accepted as an appropriate index for pension increases in payment by HMRC.
32. RPI has been referred to in Scheme literature in the past because that was the only index used by Government for statutory pension increases. However, in the 2010 June Budget the Government announced, that with effect from April 2011, annual statutory increases for public sector schemes would be calculated using CPI. In July 2010, the Government announced that the change would be extended to private pension schemes, depending on the wording of the scheme rules.
33. While I sympathise with Mr L’s position, as I appreciate that he feels his pension has been devalued, he is only entitled to the benefits provided in accordance with the Scheme Rules. The Rules allow pension increases to be measured by use of CPI, there is no guarantee of any particular index, so this is actually a loss of expectation.
34. I can only direct redress for financial loss where the respondent has made an error, which has directly led to the applicant’s financial loss, and I am only able to correct an error in order for the applicant to receive their correct entitlement under the rules. It is not appropriate to direct redress for financial loss in Mr L’s case as he is receiving the benefits to which he is entitled under the rules of the Scheme. Therefore, I do not uphold Mr L’s complaint.

Anthony Arter

Pensions Ombudsman
28 May 2019