

Ombudsman's Determination

Applicant	Mr L
Scheme	The Hertz (UK) 1972 Pension Plan (the Plan)
Respondent	PTL Pitmans Trustees Ltd (the Trustee)

Outcome

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

Complaint summary

3. Mr L's complaint is that over the last three years, annual increases to his pension benefits have not been calculated in line with the Plan's rules.

Background information, including submissions from the parties

4. Mr L is a member of the Plan, which is governed by the Trust Deed and Rules of the Hertz (UK) 1972 Pension Plan (**the Rules**). Some years ago, Mr L's benefits under the Plan came into payment.
5. In 2010, the Government decided that for statutory purposes Consumer Prices Index (**CPI**) linking, and not Retail Prices Index (**RPI**) linking, should apply to pensions in payment. So, the Occupational Pensions (Revaluation) Order 2010 (**the Order**) was enacted to accompany the Pension Schemes Act 1993 (**the Act**). The relevant parts of Schedule 3 to the Act say:

"2(1) For the purposes of paragraph 1 the Secretary of State shall in each calendar year by order specify a revaluation percentage for each period which is a revaluation period in relation to that order."

"2(3) The revaluation percentage which the Secretary of State is to specify in relation to each revaluation period is—(a) the percentage which appears to him to be the percentage increase in the general level of prices in Great Britain during the period which is the reference point in relation to that revaluation period..."

6. The Order provides the index rates and the relevant caps that apply and took effect from January 2011.
7. Under Part I(2) of the Rules, "Definitions", it says: -

““Index of Retail Prices” means the Central Statistical Office’s [CSO’s] index of retail prices published by the Department of Employment or any other index approved for the purposes of the Plan by the Board of Inland Revenue.”
8. Part VIII of the Rules contains the provisions on scheme limits.
9. Under Part VIII(55)(B)(d) of the Rules, "Guide to Inland Revenue Limitations", it says:

“The Member’s Aggregate Retirement Benefit shall not exceed...

(c) on leaving Relevant Service before attaining age 75, a pension of 1/60th of Final Remuneration for each year of Relevant Employment prior to leave Relevant Service (not exceeding 40 years) or such greater amount as will not prejudice approval of the Plan under the Act. The amount so computed may be increased at the rate of 5 per cent. per annum compound or, if greater, in proportion to any increase in the Retail Prices which has occurred between the date of termination of Relevant Service and the date on which the pension begins to be payable. Any further increase necessary to comply with Social Security legislation is also allowable.”
10. Under Part VIII(55)(F) of the Rules, "pension increases", it says:

“The maximum amount of a pension ascertained in accordance with this Rule less any pension which has been commuted for a lump sum or the pension equivalent of any benefits in lump sum form or surrendered to provide a pension for the Member’s widow, widower or Dependant Relative may be increased at the rate of 3 per cent. per annum compound or, if greater, in proportion to the increase in the Index of Retail Prices since the pension commenced.”
11. In 2012, after obtaining legal advice the Trustee switched from RPI to CPI as the basis for revaluing pensions in payment.
12. Later, Mr L complained to the Trustee as he did not believe that the Rules allowed it to switch from RPI to CPI. His complaint about this ended in June 2014, when the Trustee said it would not correspond with him further in relation to this issue.
13. In 2016, following judgements being delivered in some court cases, concerning whether or not pension schemes could switch from RPI to CPI, Mr L contacted the Trustee. He said the judgments showed that the Trustee could not switch from RPI to CPI; he also asked to see the Trustee’s legal advice, however this request was turned down.

14. In February 2018, Mr L complained under the Plan's internal dispute resolution procedure (**IDRP**). The key points were: -

- The only relevant part of the Rules was Part I(2), which said: "Index of Retail Prices... means the CSO index of retail prices published by the DoE or any other index approved for the purposes of the Plan by the Board of Inland Revenue..."
- He had been Chair of the Plan for 12 years and a trustee for 16. Since 1988, the Plan had always paid increases based on RPI.
- According to the Plan's accounts, the Trustee had received legal advice stating, from 2012 benefits should be increased in line with CPI. However, it had not disclosed the advice.
- As shown in the recent judgments, the Government unilaterally imposed CPI on public sector plans, but did not give private sector trustees the power to make this change.
- The 2016 Court of Appeal judgement in *Barnardo's v Buckinghamshire*, said trustees could not switch from RPI to CPI if the former remained an "officially published index", which it did in this case.

15. In April 2018, the Trustee responded under stage one of the IDRP. The key points were: -

- Over the years, it had corresponded with Mr L in relation to the change from RPI to CPI. But in 2014, it confirmed that it would not do so any more.
- The Trustee took advice about the change in index and was paying pension increases in line with statutory requirements; the advice was confidential so would not be shared.
- Mr L was not raising any new issues, so it had nothing to add. The *Barnardo's* scheme, and the BT scheme, which Mr L had also referred to, had different rules, and therefore did not apply to his particular case.

16. Mr L appealed.

17. In June 2018, the Trustee responded under stage two IDRP. The key points were: -

- Every pension was governed by its own rules, which varied from scheme to scheme; the Plan itself was being governed correctly in accordance with the Rules.
- The Government had imposed the change to CPI on public sector schemes but had not said that private sector schemes could not make the change too. The question whether schemes could make this change depended on their rules and the circumstances.
- The *Barnardo's* case referred specifically to the rules of that scheme; it did not draw conclusions applicable across all pension schemes.

18. Dissatisfied with the Trustee's responses, Mr L referred his complaint to this Office. This Office confirmed that because Mr L has previously complained to the Trustee in

relation to revaluation of his Plan benefits, our investigation would be limited to those events that occurred in the last three years. Mr L accepted this.

Adjudicator's Opinion

19. Mr L's complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Trustee. His findings are summarised below: -
- There was no specific provision in the Rules regarding pension increases. Without a specific rule, the Trustee was required to apply pension increases in line with statute.
 - Under the current statutory regime, pensions must be increased annually by reference to CPI, as statutory indexation was based on inflation rates fixed by annual revaluation orders; the Plan provided for increases in line with those requirements.
 - The Trustee did not unilaterally change the index applied to increases; it applied the change in index used under statutory revaluation orders, from RPI to CPI, after the Order took effect in January 2011.
 - In cases involving RPI v CPI indexation, the Ombudsman had made decisions relying on the wording of the particular scheme rules.
 - Part I(2) of the Rules defined: "Index of Retail Prices" as: "the [CSO's] index of retail prices published by the Department of Employment or any other index approved for the purposes of the Plan by the Board of Inland Revenue." Further, "any other index" could refer to CPI. In any case, the main section of the Rules was silent on what revaluation rate should apply to pensions in payment.
 - In the absence of a specific index, it was not unreasonable for the Trustee to use the official rate specified under the Order (as provided for under the Act).
 - In the Barnardo's case, the judge found that the trustees did not have the power to use a different index as long as RPI remained an officially published index. However, the Barnardo's case turned on the meaning of "the prescribed rate" and "Retail Prices Index" in that scheme's rules.
 - In this case, there being no specific provision in the Rules in relation to pension increases, the Trustee acted reasonably in changing from RPI to CPI, following the change introduced by the Order (as provided for by the Act).
20. The Trustee accepted the Adjudicator's Opinion.
21. Mr L did not so 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

22. Mr L says whilst the Adjudicator considered that "any other index" could refer to CPI, he is not aware of any other index being approved for the purposes of the Plan by the Board of Inland Revenue; so, the only relevant index under the Rules is that defined in the Rules, that is, RPI. Also, he can produce evidence that RPI was, for many years, the only index used for revaluing benefits under the Plan. Moreover, the legal advice relied upon by the Trustee could be unclear and, in any case, was open to interpretation. Finally, the fact that the Trustee will not disclose its advice leads him to conclude that it may have something to hide.
23. The Trustee has explained that in this Scheme there is no rule which provides a right to increases. Index of Retail Prices is defined because the term is used in Part VIII. Part VIII is the scheme limits appendix, that is one which sets out the maximum payments which may be made by the Scheme. The provisions set out above provide for limits in two different situations. Part VIII does not contain an increase rule providing a positive right. I agree with Mr L that in so far as there is a rule which refers to the definition the only relevant index under the Rules is that defined in the Rules. However, I agree with the Trustee that Part VIII does not contain a rule creating a right to increases therefore I do not consider that the definition can be determinative of Mr L's complaint.
24. In the absence of an increase rule, statutory increases apply at the rate prescribed from time to time by statutory instrument. Accordingly, since the statutory revaluation basis changed from RPI to CPI, the correct index for purposes of calculating pension increases has been CPI.
25. I do not dispute that, as Mr L has claimed, for many years the applicable index for calculating increases under the Plan was RPI. However, the Trustee has explained that it did not make an active decision to change the index in use. It has simply complied with the requirements as they have been imposed by statute from time to time. Mr L has produced nothing to cause me to doubt that explanation.
26. Therefore, I do not uphold Mr L's complaint.

Karen Johnston

Deputy Pensions Ombudsman
14 May 2019