

## Ombudsman's Determination

Applicant	Mr L
Scheme	Interserve Pension Scheme (the <b>Scheme</b> )
Respondent	Interserve Trustees Limited (the <b>Trustee</b> )

### Complaint Summary

1. Mr L's complaint concerns the Trustee's decision in exercising its discretion to change the index used for future increases on pensions in payment. Mr L argues that:-
  - The Trustee did not have sufficient power under the Trust Deed and Rules dated 31 August 2017 (the **Rules**), to change the index from the Retail Price Index (**RPI**) to the Consumer Price Index (**CPI**).
  - His retirement letter contained the words "in accordance with the rules of the scheme." This indicates that the Rules were followed in deciding his pension. The Rules at that time did not contain any provisions for the subsequent change to CPI.

### Summary of the Ombudsman's Determination and reasons

2. The complaint is not upheld because recent case law and the Rules do not prevent the Trustee from changing the index.

### Detailed Determination

#### Material facts

3. The Rules state:

#### "OPERATIVE CLAUSES

**NOW THIS DEED WITNESSES** that the Principal Company (in exercise of its power under Clauses 9, 10, 11 and 12 of the Seventh Definitive Deed and all other enabling powers) with the acknowledgement of the Trustee and consent

of Landmarc to the extent necessary hereby alters the trusts powers and provisions of the Scheme individually the Trust Deed and the Rules by substituting the operative clauses of the Trust Deed and the Rules (including the Schedules to the Rules set out in the print attached to this deed for the operative provisions of the Seventh Definitive Deed and Rules to the following effect –

1. The substituted operative clauses of the Trust Deed together with the definitions relevant to that Deed contained in Section 2 of Part 1 of the Rules shall have effect from the date of this deed and shall apply to all beneficiaries under the Scheme.
2. Rule 1.2 of Part 1, Parts 2 to 17 of the substituted Rules (together with the definitions relevant to those sections contained in Section 2 of Part 1 of the Rules) shall have the effect from 1 September 2017 but shall apply only to and in respect of Members (as defined in the said Section 2 of Part 1) in Pensionable Service (as so defined) on or after that date, except as provided below and except as the Principal Company and the Trustee otherwise determine...

The provisions of the B&P Transfer Deed will continue to apply to the calculation of benefits for and in respect of pensioners and deferred pensioners for which the B&P Scheme was liable until 31<sup>st</sup> October 2001."

4. Clause (a) of Part 1: "General Rules" under Section 2: interpretation, governing law and definitions, defines "**Index**" as:

"other than as specified in (b), (c), (d) or (e), the Government index of retail prices for all items *or any other index selected by the Trustee*, subject to Registered Status not being prejudiced;

...in respect of Landmarc Section Members means the Government Index of *Retail Prices* for all items or any other index selected by the Nominated Part B Company subject to Registered Status not being adversely affected;  
[emphasis added]

5. In respect of "B&P Members", Rule 6.1: increasing pensions in payment and deferred benefits, indicates that pensions in payment, in excess of the Guaranteed Minimum Pension (**GMP**), shall increase in line with the percentages specified in Rule 6.1 "or, if less, the percentage increase in the **Index** [emphasis added]."
6. Mr L was an active member of the Building & Property (**B&P**) Group Scheme, which subsequently transferred to the Scheme, formerly the Tilbury Douglas (**TD**) Pension Scheme, in 2001 (the **Transfer**).
7. At the time of the Transfer, the following definition of index applied in respect of retired and deferred members of the B&P scheme:

“the index of retail prices published by the Department of Employment or any other index agreed as suitable for the purposes of the Plan by the Pension Schemes Office.”

8. Under the B&P section of the Scheme (the **B&P Section**), the term “Index” is defined as, “the Government Index of Retail Prices for all items or any other index selected by the Trustee, subject to Registered Status not being prejudiced.”
9. Mr L left pensionable service in August 2005. He retired in July 2014.
10. On 3 October 2005, the Trustee sent Mr L a certificate in respect of his deferred pension benefits in the B&P Section (the **Certificate**). The Certificate’s opening paragraph confirmed that the benefits detailed were retained for Mr L “under the Rules of the Scheme.”
11. Under the section headed “**Pension Increases**,” the Certificate states:

“Your pension, in excess of the GMP, is guaranteed to increase during retirement by the rise in the RPI subject to a maximum increase of 5% per annum ...

The pension payable to your spouse will be similarly increased”.
12. On 23 April 2014, Mr L was sent details of his benefits on retirement (the **Retirement Pack**). Mr L was given the standard options of a full pension, or a lump sum and reduced pension.
13. Mr L was quoted a third option: to exchange future increases on his pension earned before 6 April 1997, in excess of the GMP, for a higher pension on retirement (**Pension Increase Exchange Benefits**).
14. The Retirement Pack confirmed that Mr L’s options had been calculated in accordance with the Scheme Rules and pension legislation.
15. A key information sheet (the **Information Sheet**) was enclosed as part of the Retirement Pack. It indicated that Mr L’s pension in payment, excluding the GMP, would increase “In line with price inflation,” subject to a maximum of the percentage increases advised in the Information Sheet.
16. The accompanying notes (the **Notes**) in respect of the pension increase exchange exercise included the following wording:

“The annual increases ordinarily applied to your pension provide some protection against increases in the cost of living. By accepting the one-off increase to your pension you will lose some of this protection against future inflation.”
17. The Notes indicated that any pension earned after 5 April 1997, would continue to receive increases in accordance with the Rules of the Scheme.

18. Mr L's retirement option form contained the following caveat:

"The benefits quoted have been based on the current terms of the Interserve Pension Scheme and legislation; as a result they are not guaranteed. In the event of any change your benefits would be recalculated and further details would be provided at the appropriate time."

19. On 13 September 2018, Mr L complained to the Trustee regarding the "Company's unilateral decision" to change the index used to calculate future increases to his pension from RPI to CPI.
20. Mr L stated that at the time he transferred from the B&P scheme, "the only reference was to RPI." It had not been made clear to him on his retirement from the Scheme that the Company considered that it could change the index at a future date.
21. Mr L argued that he had been "disadvantaged as [he] **may** have chosen to take part of [his] pension as a cash sum on retirement had this been made clear." [emphasis added].
22. On 4 October 2018, the Trustee issued its response. The Trustee said Mr L was aware that the Principal Employer had experienced "serious financial difficulties" earlier that same year. This prompted the Principal Employer to "request that the Trustee exercise its power to select CPI as opposed to RPI" as the index for increases in payment and revaluation on deferred benefits.
23. The Trustee explained that had the Trustee not agreed to the request, the Principal Employer may not have been able to secure the long term funding required to continue in business and operate the Scheme.
24. Section 67 (**Section 67**) of the Pensions Act 1995 (the **Act**), applies to any power conferred on any person by an occupational pension scheme, other than a public service pension scheme, to modify the scheme. Section 67 provides that:
- "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."
25. Broadly, the requirements under subsection (3) are that the trustees have satisfied themselves that either the "certification requirements," or the "requirements for consent" are met in respect of the member concerned.
26. The Act defines the certification requirements as "prescribed requirements for the purpose of securing that no power to which [section 67] 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."

27. Mr L maintains that the switch in the index to CPI, would result in a reduction [to his pension] of almost 20% over a ten year period. In the event that the Principal Employer becomes insolvent, and the Scheme enters the Pensions Protection Fund (the **PPF**), his pension would be calculated from the “new lower figure.” Consequently, he would suffer a further reduction in his pension.

### **Summary of Mr L’s position**

28. Mr L’s further submissions are detailed below:-

- The correct definition of the “index” was used in the calculation of his retirement benefits, as defined in Clause (a) of Part 1 of the “General Rules”.
- There is no mechanism in the Scheme provisions for CPI to be retrospectively applied in respect of increases to pensions in payment. The Rules allow alteration to the index used to calculate a pension. The Rules do not permit changes to be made once the pension commences.
- Notwithstanding this, the Certificate is a “final statement of the terms specific to [him].” He remembers being pleasantly surprised when he received the Certificate. He was a Senior Manager, so he read everything carefully.
- The Certificate defines the pension payable and is a “contractual” document that takes precedence over the general Rules. Only RPI is referred to in the Certificate. Consequently, once issued, the Certificate cannot be altered.
- The Trustee has sought to justify its decision to change the index by claiming that the switch to CPI is necessary for the financial stability of Interserve. He does not consider this to be a valid reason to reduce his pension.
- The reference in the Rules to “any other index selected by the trustee,” is to allow for the possible cessation of publication of an RPI index. It is not intended for the purpose of reducing the Company’s pension liability.
- The Trustee has referred back to the Rules of the B&P scheme. At the time of the Transfer, there was no indication that the B&P Rules would continue; the only reference was to RPI.
- He does recall that the B&P scheme did have provision for a change to a different index for pension calculations. However, paperwork provided around the time of the Transfer only referred to RPI.
- The position was also not made clear to him at the time of his retirement. He has been made aware by other pensioners of the Scheme, that the Rules have since been altered to allow for other indices, without any specific index being referenced in the Rules. Unfortunately, he has destroyed the paperwork.

## **Summary of the Trustee's position**

### **29. The Trustee's submissions are detailed below:-**

- The Trustee took legal advice on the issue. The Trustee made its decision to switch the index taking into account all relevant factors.
- The Scheme could have ultimately entered the PPF. This would result in a reduction in benefits for the majority of members.
- There is nothing in the Trust Deed and Rules to suggest that this alteration cannot be effective where a member's pension is already in payment.
- The change in the index from RPI to CPI does not infringe Section 67 of the Act.
- The definition of index that applies in Mr L's case is detailed in the B&P Section of the Rules.
- The definition applicable to members who were pensioners or deferred members of the B&P scheme at the date of the Transfer, does not apply to Mr L. In any case, legal advice confirmed that the [Scheme] provisions also provided a power to change the index [in respect of these members].
- The Certificate is not a contractual document and does not confer an indefinite right to pension increases by reference to RPI. The Certificate does not override the Trust Deed and Rules.
- The Certificate reflected the practice and statutory requirements at that time. It should be viewed in this context.
- The most recent communication available to Mr L was the Retirement Pack. The Retirement Pack does not expressly refer to RPI. Consequently, at the point Mr L took the decision to draw his pension, the Scheme did not specifically refer to RPI.
- Mr L claimed that he would have elected to exchange part of his pension for a lump sum. For this argument to succeed, Mr L needs to prove that he was provided with incorrect information; that his reliance on the misstatement was reasonable; and that he suffered financial detriment as a result of his reliance that he was unable to mitigate.
- It cannot be argued that Mr L was provided with incorrect information at the time of his retirement. The Retirement Pack stated that his pension would increase in line with price inflation and not RPI.

- It was not reasonable for Mr L to have relied on statements contained in his Certificate and Retirement Pack as an indefinite right for his pension to be increased in line with RPI.
- In any case, it is not clear whether Mr L has suffered any financial loss. The Scheme's commutation factor of 10:1 means that it is highly probable that Mr L would have been financially less well off if he had exchanged part of his pension for a lump sum.

30. In response to the Preliminary Decision that I issued in respect of the complaint in March 2020, Mr L raised the following points:-

- The Rules postdate his retirement. He no longer has a copy of the Scheme Rules that applied at the time of his retirement. Consequently, he relies on The Pensions Ombudsman to check that the correct rules have been submitted by the Trustee.
- It is unclear how the "mechanism," that allows the pension increase provisions to be altered, operates.
- His argument concerning his Certificate turns on the "order of precedence of the words in the initial paragraph". This clearly states that his pension has been determined "In accordance with the rules".
- The Certificate solely refers to "RPI" and makes no reference to the "Index". Consequently, it is not reasonable to use the terms RPI and Index interchangeably.
- Had the Certificate quoted an amount of initial pension and indicated that this would be "liable to alteration" under the Scheme Rules, then he would concede that an alternative index to RPI could be used in this case.
- He does "not see how the [Trustee's] decision to change the Index in order to decrease the Company's liabilities should affect pensions in payment."

## Conclusions

31. Mr L's complaint concerns whether the Trustee is prevented from changing the index used to calculate the annual increases on his pension from being linked to RPI.
32. Mr L was an active member of the B&P Section at the date of Transfer. This has not been disputed. In the absence of documentary evidence to the contrary, I am satisfied that the Rules, which were submitted to The Pensions Ombudsman by the Trustee's legal advisers, are the applicable Scheme provisions.
33. It is not uncommon for the use of RPI to be expressly drafted into pension scheme rules. It is also not uncommon for scheme rules to provide for RPI but allow the

trustees and/or employer the power to switch to an alternative index in certain circumstances.

34. Recent case law has held that where the pension scheme rules expressly allow for an option to change the index from RPI to any other appropriate index, then it is possible for the trustee and/or employer to switch to an alternative index in circumstances specified in the scheme rules.
35. In the recent case of *Barnardo's v Buckinghamshire* (2018), throughout the appeal process the courts held that the scheme's rules were drafted in such a way that there was no power under the rules to change the index from RPI to CPI. 'Retail Prices Index' was defined as the General Index of Retail Prices or any replacement adopted by the trustees without prejudicing Approval. The issue was whether this definition meant RPI or any index that is adopted by the trustees as a replacement for RPI; or whether it meant RPI or any index that replaces RPI and is adopted by the trustees. Ultimately, the Supreme Court confirmed that the latter view was the correct one.
36. In *BT plc v BT Pension Scheme* (2018), BT plc lost its appeal against the High Court's ruling that it did not have the power to amend the index used to calculate pension increases. The Court of Appeal upheld the view that the test set out in the scheme rules had not been met; RPI had not become inappropriate for the purposes of the rules. Therefore, they were bound to follow the statement in the rules.
37. In *Qinetiq Trustees v Qinetiq Holdings Ltd* (2012), the scheme rules referred to RPI or any other suitable cost of living index selected by the trustees. The court held that where the scheme's provisions gave the trustees power to change or select the index, the trustees could exercise that power in relation to periods of accrual both before and after the change without infringing section 67 of the Act. This judgment was approved in *Arcadia Group v Arcadia Group Pension Trust* (2014), where it was held that a scheme provision providing for RPI, or any similar index satisfactory for the purposes of HM Revenue & Customs, allowed the trustees and employer jointly to select CPI as an alternative index.
38. Since recent case law does not appear to preclude a change in index, whether the Trustee has the power to switch the index from RPI will depend on the construction of the Rules.
39. Under the "General Rules", the term "index" is defined as "the Government index of retail prices for all items or any other index selected by the Trustee, subject to Registered Status not being prejudiced".
40. On an ordinary construction of the words, the definition appears to allow the Trustee to change the index from RPI to CPI in a similar manner as in the cases of *Qinetiq* and *Arcadia*. I find that the statement "or any other index selected by the Trustee," grants powers to the Trustee to exercise discretion to change the index from RPI to CPI when the Trustee determines this to be appropriate for the Scheme.



41. In respect of "Landmarc Section Members", the term "Index" is defined as "the Government Index of Retail Prices". That is, RPI.
42. There is nothing to suggest that the definition of "Index", that applies to Landmarc Section Members, applies to Mr L. Had the draftsman intended RPI to be "hard-wired" as the basis for pension increases in respect of members of the B&P Section, the draftsman would more likely have referred to "the Index", when defining the overriding limit for escalation.
43. I acknowledge that the Certificate indicates that Mr L would receive increases in payment in line with RPI, "subject to a maximum increase of 5% per annum."
44. Mr L contends that the Certificate is contractual in nature and takes precedence over the Rules. The Trustee is prevented, "estopped", from going back on the alleged promise to provide pension increases in line with RPI. Consequently, the Trustee is duty bound to continue to increase his pension in line with RPI.
45. For Mr L to have a successful defence under estoppel, there would need to be evidence of something unequivocal, more akin to a promise or confirmation in response to a specific enquiry, intended to be acted upon, which it would be unconscionable for one of the parties to renege on the agreed assumption where it would be wholly unfair or unjust to do.
46. Mr L must show that he will suffer financial detriment if the Trustee is not held to providing increases in line with RPI. Mr L must also be able to demonstrate that his alleged change of position resulted from either an incorrect statement or representation of entitlement where he was not at fault. Or, facts or law assumed to be correct by the parties, but which in reality are incorrect.
47. The effect of a successful estoppel defence would be that the Trustee would be held to comply with the information provided to Mr L that indicated that he would receive increases in line with RPI.
48. The general position is that a pension scheme member is only entitled to receive the benefits provided for under the applicable rules or regulations that govern the scheme. That is, those based on correct information accurately reflecting the scheme provisions.
49. Mr L's Certificate states that his pension, in excess of the GMP, is guaranteed to increase during retirement in line with RPI subject to the maximum annual increase specified in the Certificate. It is common for pension statements to contain a disclaimer stating that the scheme's trust deed and rules override anything that might be at odds with the scheme's governing documentation. I acknowledge that the Certificate does not include a disclaimer. This does not materially change the outcome in the circumstances.

50. I am not persuaded that Mr L has successfully demonstrated that the Certificate confers an indefinite right to pension increases by reference to RPI when this is not supported by the Rules.
51. I find that the Certificate correctly reflected the basis for pension increases applicable at the time it was issued. There is nothing in the Certificate that supports that the Trustee provided Mr L with an explicit undertaking that RPI would be retained indefinitely.
52. The notes contained in the Retirement Pack, indicated that Mr L would receive increases in line with inflation. In the absence of a specific definition set out in that document, I am not persuaded that it was reasonable for Mr L to have assumed from the Retirement Pack that RPI would apply in perpetuity.
53. If the index was a key consideration in Mr L's decision to take the full pension option, Mr L should have, at the very minimum, queried the position before proceeding to draw his pension. There is nothing in the evidence to indicate that he did.
54. Even if Mr L could demonstrate reasonable reliance on the notes in the Certificate that indicated that RPI would apply, it is not clear that Mr L would have acted materially any differently. Nor is it evident that he has suffered actual financial loss as a result of his alleged reliance.
55. It does not necessarily follow that Mr L would have been financially better off had he taken the option of a lump sum and reduced pension. It will ultimately depend on the value of the retirement benefits Mr L will receive over his lifetime when compared with the total benefits he would have received had he not taken the full pension option.
56. The Trustee has indicated that had the Trustee not agreed to the request to change the index, it could ultimately have impacted on the Principal Employer's ability to operate the Scheme. I appreciate that Mr L considers that the Trustee's decision to alter the index should not have adversely impacted pensions in payment.
57. I recognise that a key duty for pension trustees is to pay the benefits promised to members. I am mindful that the ability of trustees to fulfil this objective is contingent on the sponsoring employer's financial ability to support the Scheme now and in the future.
58. It is a well-established principle that trustees of pension schemes should not reach decisions based on irrelevant, irrational or improper reasons. I am satisfied that the Trustee directed itself correctly in law and that the decision the Trustee arrived at was reasonable in the circumstances.

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59. I do not uphold Mr L's complaint.

**Anthony Arter**

Pensions Ombudsman

31 March 2020