

## Ombudsman's Determination

Applicant	Mr Y
Scheme	The Gifford Retirement Benefits Scheme ( <b>the Scheme</b> )
Respondents	Trustee of The Gifford Retirement Benefits Scheme ( <b>the Trustee</b> ) Ramboll UK Limited ( <b>the Employer</b> ) Quantum Actuarial LLP ( <b>Quantum Advisory</b> )

## Outcome

1. Mr Y's complaint against the Respondents is partly upheld. To put matters right, for the part that is upheld, the Trustee shall pay Mr Y £500 in recognition of the significant distress and inconvenience caused.

## Complaint summary

2. Mr Y has complained about the introduction of a Scheme rule which changed the increase applied to the guaranteed minimum pension (**GMP**) element of his benefits. He does not agree with the introduction of the rule as it disadvantages him, and yet he had not been informed of the change, nor was his approval sought before its introduction. Mr Y would like the 3% annual increase to continue to apply to the GMP element of his pension benefits.

## Background information, including submissions from the parties

3. In April 1992, Mr Y joined the Scheme, a defined benefit pension scheme. He received a booklet (**the Booklet**) which contained the following information:

"The amount of pension which you actually receive (and your spouse's pension) will be increased each year from 15 February by 3% compound [...]  
That part of your pension (and your spouse's pension) which represents the guaranteed minimum pension will be fully inflation-proofed and any increase in excess of 3% will be provided by the State Scheme."

"We have taken great care in the preparation of this booklet and believe that it gives an accurate summary of the provisions of your pension scheme. However, in the event of any discrepancy between this booklet and the Trust Deed and Rules, the latter will prevail."

4. In April 1997, the Scheme was closed to future accrual and replaced with a defined contribution pension scheme. Mr Y decided to retain his defined benefits in the Scheme.
5. On 3 November 2004, the Trustee and the Employer amended the Scheme Rules by executing the 2004 Trust Deed and Rules (**the 2004 Deed**). This introduced clause (c) (**the Clause**) to the Scheme Rule (**the Rule**) below:

“12.1 Calculation of pension increases

(a) Pensions will be increased compound on 1 February in each year or on such other date as chosen by the Trustees and notified to the Members.

(b) With effect prior to the date of this deed,

- (i) Benefits attributable to Pensionable Service after 14 February 1989 inclusive of GMP will increase at the rate of 3% a year,
- (ii) Benefits attributable to Pensionable Service before 15 February 1989 including GMP will increase at the rate of 5% a year.

(c) With effect on and from 3 November 2004, GMP benefits attributable to Pensionable Service after 14 February 1989 will increase in accordance with the [Pension Schemes Act 1993] (**the 1993 Act**).” (see Appendix A)

6. The introduction of the Clause was reviewed by the Scheme Actuary who, after reviewing 2004 Deed, confirmed the following:

“I hereby certify that, in my opinion, the amendments to be made to the provisions of the Scheme by this Definitive Deed will not adversely affect any member of the Scheme (without their consent) in respect of their entitlement, or accrued rights, acquired before the effective date of the Deed.”

7. Mr Y claimed his pension in January 2012. The Scheme administrator at the time quoted his pension total and said that the pension he earned after 14 February 1989, including any GMP, had been increased by 3% per annum. The benefit statement that Mr Y received in February 2015 restated this.
8. On 20 March 2015, Quantum Advisory became the Scheme’s administrator. In January 2016, it wrote to Mr Y to confirm his pension payment and said that an increase of 3% had been applied.
9. On 29 January 2018, Quantum Advisory wrote to Mr Y to say that there had been an error. In summary, it said:-
  - It had advised the Trustee that the previous administrator of the Scheme did not apply the correct pension increases to Mr Y’s annual pension.

- From 1 February 2005, the previous Scheme administrator should have applied an inflationary increase (up to 3%) to the GMP element of Mr Y's pension rather than the fixed 3%.
  - To date, Mr Y's pension had been overpaid by a total of £383.18.
  - The Trustee had a legal duty to protect the interests of all members of the Scheme. So, it was required to recover the overpayment. The Trustee proposed to freeze Mr Y's pension at its current level until such a time the overpayment had been recovered.
  - As the value of the increase that year was more than the value of Mr Y's overpayment, he would still receive a slight increase.
10. Mr Y asked for a breakdown of the calculations showing the overpayment. After Quantum Advisory responded to Mr Y, he emailed Quantum Advisory in reply, as he could not find a reference in the Scheme Rules that would suggest that the full amount of his pension, including the GMP element, should not be subjected to the full 3% annual increase. He provided letters from the previous administrator that supported this.
11. On 27 February 2018, Quantum Advisory replied saying that the previous administrator had sent incorrect information to members. It had based the increases on previous Scheme Rules, when it should have applied the Clause.
12. On 5 March 2018, Mr Y wrote to Quantum Advisory, as he understood that proposed changes made to the Scheme Rules were normally advised to members, who were then asked to sign and return an acceptance form. Mr Y asked Quantum Advisory for a copy of the Scheme Rules which applied when he joined, as well as a copy of the advice to members and a copy of his acceptance form.
13. Quantum Advisory responded that the Trustee was not required to seek consent from members in relation to changes to the Scheme's Trust Deed and Rules unless the proposed changes would diminish prior benefit promises. It also highlighted that the current Scheme Rules superseded any previous versions.
14. On 30 April 2018, Mr Y emailed Quantum Advisory. He raised the following points:-
- When he joined the Scheme, the Booklet outlined that his benefits would increase by 3% compound interest.
  - He found no advice from the Trustee relating to the Scheme that would vary the content of the Booklet and there was no confirmation given by him.
  - The change in Scheme Rules did have the effect of reducing his pension benefit.
  - He had received letters from the previous Scheme administrator and Quantum Advisory which all indicated that there would be an annual increase of 3%. So, he did not believe that Quantum Advisory had the right to reduce payments that have

been made in accordance with Scheme Rules that he thought applied to him. He thought the future reduction to his pension payments would be contrary to the Scheme Rules.

- It would be helpful if the notices sent in relation to the annual increases could include: the current payment, the future payment and percentage increase so that these figures could be readily checked.
- The matter was causing him distress and loss of sleep.

15. On 29 May 2018, Mr Y followed this up by asking Quantum Advisory if it could:

- Ensure that his current pension payments were in line with the 3% gross annual increase.
- Ensure that any underpayment, based on the above, was made good.
- Add interest to any underpayments based on the Bank of England base rate.
- Provide a calculation demonstrating the above.

16. Quantum Advisory replied on 4 June 2018. It said that it could not comply with his requests and so the next step would be for Mr Y to submit a complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

17. On 8 June 2018, Quantum Advisory wrote to Mr Y saying that the current Scheme Rules needed to be applied and would override any previous information. Had any members been affected by the Scheme Rules they would have been contacted and legal advice would have been sought on the change. Due to the various changes to the Trustee Board and the Scheme Administrators, the current Trustee could not locate a copy of the communication. The Trustee offered to repay the overpayment of £383.18 as it accepted that the change may not have been made clear to Mr Y at the relevant time. This amounted to the figure deducted from Mr Y's pension increase amount as at 1 February 2018. However, moving forward, Mr Y would need to receive the correct level of benefit to which he was entitled to under the Scheme Rules. Due to the amount of correspondence between Quantum Advisory and Mr Y, the Trustee waived the Scheme's IDRP so that Mr Y could escalate his complaint.

18. On 15 June 2018, Mr Y replied. He highlighted that he had not been advised nor had he agreed to the Clause when it was introduced, or at any other time during the course of his membership of the Scheme. With regard to the offer put forward, Mr Y said that acceptance of the Clause meant that he could experience a loss of approximately £3,000 and a reduction to the widow's pension should it become payable.

19. On 19 June 2018, Quantum Advisory confirmed that acceptance of the offer would not prejudice his right to raise future complaints on different issues before the Trustee. For this reason, the Trustee's offer remained open but if Mr Y did not wish to

accept the offer by 22 June 2018, the Trustee would not repay the overpayment and would proceed to correct his pension going forward.

### **The Trustee's and Quantum Advisory's position**

20. The Clause was introduced by the Trust Deed and Rules dated 3 November 2004. However, the Deed and Final Salary Rules dated 11 November 1994 contained provisions which allowed for discretionary increases of up to 3% to be made. In addition, these provisions were also reflected in the resolution dated 30 July 1991. So, the Trustee believes that members did not have a right to fixed increases of 3% and there was nothing in the Scheme's provisions which conferred a greater entitlement than those set out in the Rule. In the Trustee's view, the Scheme's provisions required the GMP element of Mr Y's pension to increase by inflation up to a maximum of 3%.
21. The most recent Scheme booklet referred to the correct application of pension increases in line with the Rule.
22. When Quantum Advisory took over the Scheme's administration, it carried out a review of the Scheme's benefits against the Scheme Rules. It was revealed, after discussion with the Trustee's previous legal advisers, that two predecessor administrators had been incorrectly paying pension increases in accordance with Rule 12.1 (b) and had failed to take the Clause into account.
23. Until it was known who the affected members were, and the extent to which they were affected, the Scheme continued to pay pension increases in line with the past practice. Affected members were then informed by letter on 29 January 2018, in advance of the 1 February 2018 pension increase.
24. The Trustee cannot continue to pay Mr Y's GMP element at a fixed increase of 3%. Mr Y's pension in payment will not reduce, but from 1 February 2018 his pension has been increased on the correct basis.

### **Mr Y's position**

25. All of the paperwork from when he joined the Scheme indicated that the benefits, including the GMP element, of any pension would increase at a rate of 3% per annum. The Scheme was closed to future accrual in 1997, so the change to the Scheme Rules after this should have been notified to affected members. While he accepts that the current Scheme Rules are quite clear, the Clause was introduced contrary to the Scheme's requirements and the Pensions Act 1995.
26. The Trustee is at fault for changing the Scheme Rules "to the detriment of the members without advising and seeking the agreement of the members," and the Scheme administrators are at fault for misleading the members as to the "method of inflation protection" applied to the GMP element.
27. The GMP element of his pension should accrue at the rate of 3% each year in accordance with the information provided on joining the Scheme. The Scheme

administrators, at the time he drew his pension, confirmed that an increase of 3% had been applied to the GMP element of his pension benefits, and then a further two times in February 2015 and January 2016.

28. The Trustee and/or Quantum Advisory should provide an annual statement that shows “the calculation of the accrued amounts for all elements of [his] pension”.

### **The Employer’s position**

29. It is ‘comfortable’ that the Trustee had sought necessary advice on this case from its actuarial advisers, Quantum Advisory and its legal advisers in its response to my Office.
30. It is content that a thorough review has been conducted of the Scheme benefits and that errors made by the previous administrator have been rectified, in line with the Scheme Rules.

### **Adjudicator’s Opinion**

31. Mr Y’s complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of the Trustee. The Adjudicator’s findings are summarised below:-
- The 2004 Deed introduced the Clause and also outlined the Trustee’s powers of amendment prior to the 2004 Deed’s implementation (see Appendix B). The Principal Employer and the Trustee could amend the Rules in writing and under seal retrospectively or otherwise. However, any amendment made by the 2004 Deed would have been subject to section 67 of the Pensions Act 1995 (see Appendix C), which prohibits retrospective changes being made to a pension scheme unless certain requirements are met.
  - After reviewing the 2004 Deed and a number of previous Scheme Rules, the Adjudicator’s opinion was that the Clause had been validly introduced and so the GMP increases applied as follows:-
    - GMP benefits attributable to pensionable service before 14 February 1989 are increased by 5% per annum.
    - For annual increases applied between 14 February 1989 and 3 November 2004, GMP benefits attributable to pensionable service after 14 February 1989 are increased by 3% per annum.
    - For increases applied after 3 November 2004, GMP benefits attributable to pensionable service after 14 February 1989 are increased in line with the 1993 Act.
  - The Adjudicator could not see that the Clause had any retrospective, negative impact on the GMP accrued after 14 February 1989, as the 2004 Deed only changed the increases applied to that GMP from 3 November 2004. So, the

changes were made from the date of the Deed's execution onwards. As a result, there was no requirement for the Trustee to obtain consent from the affected members prior to the Clause's introduction. This explained why there was no record of their consent when it would have otherwise been required.

- The Trustee's power of amendment did not require it to notify members of this change. So, the Employer and the Trustee had followed the Scheme's procedural requirements to introduce the Clause. Taking this into consideration, the Adjudicator's view was that Mr Y was not entitled to a continuous 3% annual increase to the GMP element of his pension benefits, as this was contrary to the Scheme Rules, which included the Clause. From November 2004, Mr Y had only ever been entitled to an increase in line with the 1993 Act's requirements for the GMP element of his pension benefits.
- Although, the introduction of the Clause was not an error, the Scheme Rules had been incorrectly applied, and Mr Y received incorrect information about the increases. Further, while the Trustee believed that notification of the change would have been sent, it had no record of this communication. So, Mr Y had experienced a loss of expectation, as he would have been under the impression that he was entitled to the 3% increase until Quantum Advisory's letter in 2018.
- The Trustee had agreed to waive the overpayment by offering to repay the £383.13 to Mr Y, in recognition of the fact that it may not have been made clear to Mr Y that the Clause had been introduced. The Trustee was not required to apply the 3% increase up to the February 2018 increase as the Scheme Rules do not permit this. Further, my Office's position on the recovery of overpayments is that, in general, money paid in error can be recovered, even if the party responsible for the error has been careless. As the Trustee was no longer seeking repayment of this, no overpayment remains. Consequently, the Trustee's offer acknowledged that Mr Y had experienced non-financial injustice.
- In the Adjudicator's view, the offer should be increased to £500 in total. While the difference between applying and omitting the Clause amounted to an overpayment of only £383.18, it was clear that Mr Y had been distressed by the errors. Further, the Trustee had multiple opportunities between 2004 and 2018, where it could have identified its error and minimised its potential impact.
- There was no legal requirement for the Trustee to provide a breakdown of Mr Y's pension in his annual statements, and, as we are not a regulator, we cannot recommend that the Trustee and/or Quantum Advisory change their current practices.

32. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y's further comments are summarised below:-

- The Booklet provided information relating to the Scheme and was the only information provided prior to joining so, in essence, it formed a contract between

him and the Trustee. The Booklet did not deal with the GMP element separately and indicated a 3% increase on 'gross' pension.

- At no time was he informed or consulted on any rule changes to the Scheme as outlined in the Booklet, particularly those made in 1994 or 2004.
- Section 67 of the Pensions Act 1995 appears to require a member's consent to any modification to the scheme that affects a members' entitlement. The rule change made in 2004 reduced his annual increase and his ongoing entitlement.
- He had not accepted the Trustee's offer as he did not agree to the rule change.
- The breakdown of his pension in the annual statements should be easy to calculate. In order for members to check the calculation of their pensions, this information should be provided "as a matter of course."

33. I note the additional points raised by Mr Y, but I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

34. Mr Y believes that by joining the Scheme and having been provided with the Booklet, containing the information outlined in paragraph 3 above, a contract has formed between him and the Trustee. The requirements for contract formation are: offer and acceptance; consideration; intention to enter legal relations; and certainty, as set out in *Carlill v Carbolic Smoke Ball Co (1892)* and reaffirmed in *Blue v Ashley (2017)*. Having reviewed the circumstances in this case, I do not consider that a contract has been formed.
35. Scheme booklets set out the facts in place at the time of their publication and should only be used for reference purposes. The Scheme Trust Deed and Rules are the governing documents, and take priority over the information found in the Booklet, which is why it contained the caveat of the Scheme Rules prevailing in the case of any discrepancy. Further, as the aim of the Booklet was to provide information to help employees and members understand the Scheme, it cannot be considered as an 'offer'. As a result, the contract formation requirements have not been satisfied.
36. With regard to the changes made to the Scheme Rules, I cannot see that the changes made in 1994 formed part of Mr Y's original complaint. Until this has been formally raised with the Respondents, I cannot comment on this as it falls outside of my remit. Nevertheless, I find that the introduction of the Clause in 2004 was validly made.
37. I acknowledge that the Clause affected the annual increase applied to the GMP element of Mr Y's pension. However, it only did so from the date of the 2004 Deed onwards, so none of Mr Y's entitlements or accrued rights prior to 3 November 2004 have been affected. As section 67 of the Pensions Act 1995 requires members' consent only when benefits accrued prior to the Scheme's alteration (the introduction of the Clause) are impacted, the Trustee did not need Mr Y's consent in this instance.

38. Mr Y also argues that the introduction of the Clause did not satisfy the Scheme's requirements. The Trustee's powers of amendment did not require members to be notified of any rule changes, nor does it say that consent would be required from any affected members. So, I do not agree that it has acted in error. As a result, Mr Y is not entitled to a 3% increase to the GMP element of his pension benefits.
39. Irrespective of the difficulty involved in calculating a breakdown of Mr Y's pension, there is no legal requirement for the Trustee to provide such information. Until there is, I cannot conclude that omitting such information from Mr Y's annual benefit statements is unsatisfactory. So, the Trustee is not required by me to do anything differently in the future.
40. I appreciate Mr Y has not accepted the Trustee's offer to repay the overpayment as he does not accept the changes that have been made. However, in light of the incorrect information provided, the loss of expectation and the distress caused, I find that the offer goes some way to recognise the impact that this has had on Mr Y. In order to fully recognise this, the offer shall be increased to £500 for the significant distress and inconvenience caused.
41. I uphold Mr Y's complaint against the Trustee and Quantum Advisory in part. I do not uphold the complaint against the Employer.

## **Directions**

42. Within 14 days of the date of this Determination, the Trustee shall pay Mr Y £500 in respect of the distress and inconvenience which he has suffered.

**Anthony Arter**

Pensions Ombudsman  
21 August 2020

## Appendix A

### Section 109, Chapter II, Part V of the Pension Schemes Act 1993

#### Annual increase of guaranteed minimum pensions

- 1) The Secretary of State shall in each tax year review the general level of prices in Great Britain for the period of 12 months commencing at the end of the period last reviewed under this section.
- 2) Where it appears to the Secretary of State that that level has increased at the end of the period under review, he shall lay before Parliament the draft of an order specifying a percentage by which there is to be an increase of the rate of that part of guaranteed minimum pensions which is attributable to earnings factors for the tax year 1988-89 and subsequent tax years for—
  - a. earners who have attained pensionable age; and
  - b. widows and widowers.
- 3) The percentage shall be—
  - a. the percentage by which that level has increased at the end of the period under review; or
  - b. 3 per cent.,whichever is less.
- 4) If a draft order laid before Parliament in pursuance of this section is approved by a resolution of each House, the Secretary of State shall make the order in the form of the draft.
- 5) An order under this section shall be so framed as to bring the alterations to which it relates into force on the first day of the next tax year after that in which the order is made.
- 6) Where the benefits mentioned in section 46(1) to (7) are not increased on the day on which an order under this section takes effect, the order shall be treated for the purposes of that section as not taking effect until the day on which those benefits are next increased.

## **Appendix B**

### **Extract from the 2004 Trust Deed and Rules**

#### Introduction

- C      Clause 12 of the Existing Definitive Deed permits the Principal Employer and the Trustees to alter or add to the terms and provisions of the Existing Rules and the trusts, powers or provisions of the Existing Definitive Deed in writing and under seal whether retrospectively or otherwise. The parties wish to exercise this power to replace the Preceding Documents in their entirety with the provisions contained in this Deed in order to consolidate the provisions of the Scheme, to ensure that the provisions comply with all legislative and regulatory requirements and to make certain amendments to the Scheme.

## Appendix C

### Section 67 of the Pensions Act 1995

#### Restriction on powers to alter schemes

- 1) This section applies to any power conferred on any person by an occupational pension scheme (other than a public service pension scheme) to modify the scheme.
- 2) 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.
- 3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion—
  - a. the trustees have satisfied themselves that—
    - i. the certification requirements, or
    - ii. the requirements for consent,are met in respect of that member, and
  - b. where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.
- 4) In subsection (3)—
  - a. “the certification requirements” means prescribed requirements for the purpose of securing that no power to which this section 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, and
  - b. “the consent requirements” means prescribed requirements for the purpose of obtaining the consent of members of a scheme to the exercise of a power to which this section applies.
- 5) Subsection (2) does not apply to the exercise of a power in a prescribed manner.
- 6) Where a power to which this section applies may not (apart from this section) be exercised without the consent of any person, regulations may make provision for treating such consent as given in prescribed circumstances.