

Ombudsman's Determination

Applicant	Mr R
Scheme	Newsquest Pension Scheme (the Scheme)
Respondents	Newsquest Pension Trustee Limited (the Trustee)

Outcome

1. I do not uphold Mr R'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 R has complained that the Scheme is changing the annual increases from the RPI inflation rate to that of the CPI rate. He would like the Pensions Ombudsman to investigate and decide if the Trustee is allowed to do this.

Background information, including submissions from the parties

4. Mr R is a pensioner member of the Scheme and in July 2018 he received an announcement from the Trustee informing him that from March 2019 the annual rate of revaluation for pension increases would be based on increases in the Consumer Price Index (**CPI**) and not the Retail Price Index (**RPI**).
5. Following a period of communication between Mr R and the Pensions Manager, in September 2018, Mr R raised an objection to the change through the Scheme's independent dispute resolution procedure (**IDRP**). The Trustee replied to Mr R on 6 December 2018. The Trustee did not uphold Mr R's complaint and concluded that its decision to agree to change from RPI to CPI for future pension increases was taken properly, having taken appropriate covenant, actuarial and legal advice.
6. Mr R did not accept the Trustee's decision and brought a complaint to this office. Mr R says that as the RPI inflation rate is usually around 1% greater than the CPI inflation rate then over a period of time members will lose a vast amount on their pensions. Mr R has also referred to the fact that the Trustee did not take into account the pension increase promises in the Southern Section Explanatory Booklet (**the**

Booklet) which states that pension increases, other than GMPs in payment, will automatically be increased in line with RPI up to a maximum of 5%.

7. The Trustee has confirmed that it did not take account of Mr R's comments in relation to the Booklet when providing its IDRPs response as these comments were received after the deadline. However, the Booklet is only a summary of the Rules of the Scheme and the booklet has a disclaimer which states:

"The detailed provisions are set out in the Trust Deed and Rules, which are the legal documents governing the Fund, and if there is any conflict between them and this Booklet, it is the Trust Deed and Rules which will be taken as correct."

8. The Scheme is governed by a Trust Deed and Rules (**the Rules**) dated 12 March 2018. Mr R is a member of the Southern Section and under Rule 23(a) of the Southern Section rules pensions in payment (in excess of GMP) are increased by reference to the definition of Index which is defined as:

"The index of Retail Prices published by the Department of Employment or such other index as may from time to time be approved by the Revenue for the purpose of the Scheme."

9. The Trustee in its formal response to this office has explained the background to the change from RPI to CPI as follows:-

- As part of the actuarial valuation at 31 March 2018, Newsquest Media Group Limited (**the Company**) asked the Trustee to agree to change the basis for increasing pensions in payment and deferment from RPI to CPI (subject to relevant caps) with effect from the annual increase dates following the valuation.
- The Trustee, prior to agreeing the actuarial valuation, undertook a covenant review of the Company which resulted in a company grading of "Weak/Tending to Weak" under the Pensions Regulator's grading system. As a result, the Trustee sought to negotiate a move to target a position where the Scheme is self-sufficient.
- Ultimately the Trustee and the Company agreed a wide package of funding measures to reduce the deficit and in due course to achieve full funding of the Scheme on a self-sufficiency basis. The package included:-
 - (i) to continue to pay annual contributions of £10 million into the Scheme, plus additional contributions totalling £24.5 million over the period to 2021, at the latest;
 - (ii) agreement from the Company to a higher funding target; and
 - (iii) a switch from RPI to CPI for future increases.
- The total contributions in (i) above represent the majority of the expected free cashflow generated by the Company over the following few years and the

additional contributions would also be accelerated if the Company performed better than forecast.

10. The Trustee also says that following detailed legal advice it considered that there is a pre-existing power under the Rules to change the Index. The wording in the definition of Index is similar to the wording in the case of *Arcadia Company v Arcadia Company Pension Trust* [2014] 067 PBLR (018) where it was held that a switch was permissible on the basis that the wording in the definition of Index in the Arcadia Scheme conferred a power to select an alternative index.
11. The Trustee has also pointed out that the wording in the definition of Index does say, in effect, that the alternative index must be approved by the Revenue. But it is no longer possible to obtain approval from the Revenue post A day (6 April 2006) and thus that element of the wording can be considered obsolete.
12. The Trustee also obtained advice that, following *Arcadia*, although the Rules are silent as to who can exercise the power, it is jointly exercisable by the Company and the Trustee given that the amendment power is a joint power. The Trustee also considered whether it would be a proper exercise of that power to agree to the Company's proposal to change from RPI to CPI and was fully aware of the legal principles that guide such decisions, namely to:
 - (a) exercise any power vested in it for the purpose for which it was given,
 - (b) give proper consideration to relevant factors and exclude irrelevant factors
 - (c) ask itself the correct questions,
 - (d) direct itself correctly in law, and
 - (e) not arrive at a perverse decision (being a decision that no reasonable body of trustees would arrive at).
13. The Trustee says that the process the Trustee went through demonstrates that it adhered to these principles as it obtained relevant professional advice both as to the financial positions of the Company and the Scheme and its powers under the Rules to change the Index. The Trustee properly considered all of the relevant factors and the decision could not be classified as perverse. It was taken in the context of a wider package of funding measures, in the interests of the Scheme's beneficiaries as a whole.

Adjudicator's Opinion

14. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised below.

15. Mr R has asked the question whether the Trustee is allowed to change the inflation measure used for pension increases from RPI to CPI. This is a question that has been the subject of several complaints to this office and also to the Courts.
16. The Courts have made a number of key decisions including the decision in *Danks and Others v Qinetiq Holdings Ltd and Another* [2012] EWHC 570 (Ch), that the Trustees' decision to change from RPI to CPI did not amount to a detrimental modification to the Applicants' subsisting rights, because a choice of index was always permitted under that scheme's rules. In those circumstances, the Applicants did not have an accrued right to pensions increases at a specific rate until the specific rate had been chosen and applied each year.
17. The Adjudicator was of the view that the wording in the definition of Index in the Rules does allow the Company and Trustee to choose another index other than RPI. The wording does say, in effect, that the alternative index must be approved by the Revenue. But the Adjudicator agreed with the Trustee that as such approval can no longer be obtained post A day this element of the wording can be considered obsolete.
18. There is a general requirement that the Trustee takes its decisions in a lawful manner. If it is found that a trustee has not asked itself the correct question, or has not adopted a proper construction of a scheme's rules, or has not taken into account all relevant (but no irrelevant) evidence, or has taken a decision which no reasonable trustee could reach, the Pensions Ombudsman may determine that the trustee has not exercised its discretion lawfully. The Adjudicator was of the opinion, from the information provided, that the Trustee had considered the correct Rules, taken professional advice as required, considered the employer's request as is reasonable, and reached a decision which is not perverse.
19. The Trustee had considered the interests of all the members and it was not unreasonable to change the basis of pension increases from RPI to CPI in order to improve the security of the Scheme as a whole. It is reasonable for a body of trustees to rely on the expert advice it has received, which the Trustee has done in this case.
20. The members were advised of the change from RPI to CPI in July 2018 some eight months before the effective date of the change which is well within the statutory disclosure requirement. The Adjudicator could not, therefore, see any reason why the change from RPI to CPI should not be allowed.
21. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr has 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 R for completeness
22. Mr R has referred to a number of Court cases as evidence on why the Trustee should not be allowed to change the index from RPI to CPI and in particular the Supreme Court decision in *Barnardo's v Buckinghamshire and others* [2018] (**the Barnardo case**). Mr R says the main reason why he thinks Newsquest cannot change the index

is because in the judgment Lord Hodge says, 'that as the RPI rate is still an active index produced by the government, it must be used'. Mr R says that he feels the wording in the Scheme is no different to that in the Barnardo case because it states that RPI is to be used.

23. Mr R has also queried the fact that the covenant review of the Company resulted in a company grading of "Weak/Tending to Weak" under the Pensions Regulator's grading system. He asks how can a company that has no debt and made over £90 million post tax profit in 2018 be considered weak. If this money was placed in the Scheme it would wipe out its shortfall.

Ombudsman's decision

24. In complaints such as this my role is to consider whether there has been an error of law or maladministration by the Trustee in agreeing to change the index from RPI to CPI and whether Mr S has suffered an injustice as a result.
25. Mr R has placed a great deal of reliance on the decision in the Barnardo case in the Supreme Court and that the wording for the definition of the index to be used in the Barnardo's Scheme is no different to that of the Scheme. Consequently, Mr R believes the Trustee should not be allowed to change the index to be used from RPI to CPI. The Barnardo case was an appeal by Barnardo's to allow the Trustees of the Barnardo Staff Pension Scheme (**the Barnardo Scheme**) to adopt a replacement index instead of the Retail Prices Index. I do not agree that the decision in the Barnardo case prevents the Trustee from making the change from RPI to CPI.
26. The decision in the Barnardo case relied on an examination of the wording of the Barnardo Staff Pension Scheme's (**the Barnardo Scheme**) trust deed and rules. The Barnardo Scheme allowed for pensions in payment to increase each year at the lesser of 5% and the percentage rise in the Retail Prices Index.
27. The Barnardo Scheme defined Retail Prices Index as the General Index of Retail Prices published by the Department of Employment or any replacement adopted by the Trustees without prejudicing approval. In my reading of the judgment the appeal failed because the Supreme Court agreed that the Barnardo Scheme wording only allowed an alternative index to be used if the Retail Prices Index was discontinued. As the Retail Prices RPI continues to be a recognised index the Trustees could not simply use an alternative index.
28. I find that the wording of the definition of Index in the Scheme is different to the Barnardo Scheme as it does allow an alternative index to be used and does not require the Retail Prices Index to be discontinued. Therefore, there is no reason why the Trustee should not use an alternative index subject to having taken appropriate actuarial, covenant and legal advice. I also find that it is not unreasonable for the Trustee to have decided to change the Index from RPI to CPI in the expectation of improving the security of the Scheme for the membership as a whole.

29. Mr R has also raised a concern over the covenant rating given to the Company by the Trustee's external covenant reviewer. The Pensions Regulator's guidance on assessing and monitoring the employer covenant explains that "the covenant is the extent of the employer's legal obligation and financial ability to support the scheme now and in the future". Furthermore, the guidance says that as well as assessing the strength of the current covenant, the assessment:

"should be forward-looking and focus on the ability of the employer to contribute cash to the scheme over an appropriate period to achieve and maintain full funding based on an assessment of the employer's forecast cash flows and the medium and long term outlook for the business and the market in which it operates.

30. Therefore, although Mr R may question the rating based on the current performance of the Company this is not the only factor taken into account in the assessment. The opinion was obtained from a professional skilled in making such assessments. This office does not have the resources or inclination to challenge a professional opinion over what may or not be the outcome in the future. However, I recognise that the Trustee is entitled to take the covenant review into account when making its decision to switch from RPI to CPI. Indeed, the Trustee would be remiss if it did not take the covenant review into account when making its decision.
31. In conclusion, therefore, I find that there has not been an error of law or maladministration by the Trustee in agreeing to change the index from RPI to CPI and I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
9 July 2019