

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr Julian Squire
Scheme	Sodexo Pension Fund (the Scheme)
Respondents	Aon Hewitt (Administrator), The Trustees of the Sodexo Pension Fund (the Trustees)

Subject

Mr Squire complains that the Trustees and Administrator provided him with incorrect information over a period of 13 years regarding his entitlement from his deferred benefits. He says he based certain decisions on this misinformation.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the Administrator because they provided information which they ought to have known was incorrect to Mr Squire causing him distress and inconvenience. The complaints against the Trustees cannot be upheld.

DETAILED DETERMINATION

Scheme Rules

Scheme rules 2006 – The Fourth Appendix

The Special Members Appendix Part I – Executive Members

3. Pension on early retirement

The following paragraph shall apply of paragraph (b) of Rule 8.3:

(b) who retires otherwise than on account of Incapacity will be calculated in the same way as the yearly rate of a pension starting at Normal Pension Age under Rule 7 but will be reduced by an amount of $\frac{1}{4}$ % for each month that retirement precedes age 60 Provided [sic] that the pension payable under paragraph (a) of Rule 7.2...in respect of his Pensionable Service as an Executive Member shall be the prospective pension payable at Normal Pension Age as a result of the prospective period of Pensionable Service as an Executive Member projected to Normal Pension Age multiplied by the proportion that the period of Pensionable Service as an Executive Member actually completed to the date of leaving Service bears to the period of Pensionable Service as an Executive Member projected to Normal Pension Age.

2. Pension on retirement at Normal Pension Age

The Following Rule shall apply in place of Rule 7.2:

7.2 (a) The pension payable under Rule 7.1 [pension at retirement] to a Forte Fund Member who became an Executive Member before the date of this deed or such other executive member chosen by the Principal Employer with the consent of the Trustees for who arrangements to the satisfaction of the Trustees have been made for the payment by the Principal Employer... of such additional contributions to the Main Fund (if any) as the Trustees may determine acting in accordance with advice of the Scheme Actuary shall be at a yearly rate equal to $\frac{1}{30}^{\text{th}}$ of his Final Pensionable Salary multiplied by the number of complete years of his Pensionable Serviced provided that the yearly rate shall not exceed $\frac{2}{3}$ rds of his Final Pensionable Salary.

28. Amendment of the Trust Deed and the Rules

The Principal Employer, with the consent of the Trustees, may by deed to be executed by the Principal Employer and the Trustees cancel, amend or add to all or any of the trusts, powers and provisions of this Trust Deed and the Rules with retrospective, immediate or future effect....

Deed of correction

Executive accrual correction

1. Paragraph 2 of Part I of the Fourth Appendix shall be amended by replacing the words “before the date of this deed” in the rule which is to apply in place of Rule 7.2 (a) in respect of Executive Members with the words “before 14 February 1995” with effect from 14 February 1995 in relation to the 1995 Deed and with effect from 19 October 2006 in relation to the Definitive Deed and Rules as if the reference in that paragraph to “before the date of this deed” had always been a reference to “before 14 February 1995” in any deeds governing the Scheme since 14 February 1995.

Material Facts

1. Mr Squire joined the Scheme on 1 May 1980. He left the Scheme on 9 December 1998. Mr Squire's final pensionable salary on leaving the Scheme was £90,247.16.
2. When Mr Squire left the Scheme, he had accrued 17 years 3 months of pensionable service as an ordinary member and 1 year 4 months as an executive member. In total he had 18 years 7 months pensionable service within the Scheme.
3. When Mr Squire left the Scheme he received confirmation from the Administrator that when he retired at 60 in 2017, his annual pension would be £29,957.04, after pension commencement lump sum. Mr Squire says that the person who sent him the pension statement, was also a company director of Sodexo.
4. Mr Squire says that the Administrator continued to send him benefit statements stating the annual pension would be £29,957.04 over a period of 13 years after he left the Scheme.
5. On 27 February 2012, the Administrator wrote to Mr Squire. They explained that the original benefit statement issued was incorrect and as a result they conducted a review of the benefits due to him. They explained that they made a mistake in calculating the pension due to him. They said:

“As an Executive Member of the Fund, your benefits accrued at a rate of the lesser of:

- $1/30^{\text{th}}$ of your Final Pensionable Salary for each year of the Pensionable Service; or
- such amount of Final Pensionable Salary per year of Pensionable Service such that, had you remained in Pensionable Service until Normal Pension Age (60), your total pension at that age would have equated $2/3$ of your Final Pensionable Salary.

(Prior to becoming an Executive Member, your benefits accrued at a rate of $1/60^{\text{th}}$ of Final Pensionable Salary for each year of Pensionable Service.)

In your case, the second rate was the lower. However, your benefits as an Executive Member were previously calculated at the incorrect, higher amount...”

6. The Administrator confirmed that the revised pension Mr Squire will be £28,275.84 per annum.
7. As a result of receiving statements from the Administrator over this period, Mr Squire says he took financial decisions on the expectation that he would receive the pension quoted.
8. He says these financial decisions are:
 - his divorce settlement,
 - his decision to retire from corporate life in May 2006,
 - his personal investment strategy, and
 - his personal spending pattern.
9. Mr Squire appointed Addleshaw Goddard to represent him. They wrote to the Trustees on 19 October 2012. Addleshaw Goddard said that the statement Mr Squire received when he left the Scheme was correct based on the Scheme rules in place at that time. They understood that 1/60th was for ordinary service and 1/30th for executive service, yet the Administrator had not given a breakdown of their calculation.
10. Addleshaw Goddard further added that the 2006 Scheme rules said “before the date of this deed” and that the provisions within rule 7.1 and 7.2 apply to him allowing his whole pensionable service to be classed as executive member. So they argued Mr Squire was due a higher pension because his entire pensionable service would be calculated at 1/30th.
11. The Scheme’s head of pensions replied on 30 January 2013 under the Internal Dispute Resolution (**IDR**) procedure stage 1. They thanked Addleshaw Goddard for highlighting “an obvious drafting error”. The Trustees say that the 2006 Scheme rules should not have used the wording from 1995 Scheme rules, but should have replaced the wording “before the date of this Deed” with “before 14 February 1995”. This would have ensured a consistent transition from 1995 Scheme rules to 2006 Scheme rules. The Trustees amended the Scheme rules to change the wording by a deed of amendment.

12. The Trustees added that the previous incorrect annual pension of £29,957.04 did not include the "N/NS" adjustment which would have been applied in accordance with Rule 8.3(b).
13. The Trustees completed the stage 2 of the IDR procedure on 15 July 2013. The Trustees apologised if the benefit statements he received did not include the "N/NS" adjustment, but said that Mr Squire had not provided evidence which would show that he relied on the misinformation to his detriment.
14. The Trustees said that the 2006 Scheme rules were not intended to change the benefits payable to executive members. The 2006 Scheme rules were amended to include the changes stated within the Finance Act 2004. The error in the wording, was a drafting error, however this has been amended by deed of amendment by Sodexo and the Trustees. The Trustees considered the deed of amendment as the most cost effective solution in changing the Scheme rules, as they never intended to uplift executive members pension,
15. The Trustees say that section 67¹ of the Pensions Act 1995 does not apply, when any claim is based on obvious error rather than subsisting right.

Summary of Mr Squire's position

16. The Trustees and Administrator have not exercised due diligence towards him and his benefits since he became a deferred member of the Scheme. They have consistently provided benefit statements which highlighted his annual pension as £29,957.04, which was the incorrect figure. He adds that the Trustees and Administrator have not explained to him why they made the errors on his statement.

¹67A (6)"Subsisting right" means-

(a)in relation to a member of an occupational pension scheme, at any time-

(i)any right which at that time has accrued to or in respect of him to future benefits under the scheme rules, or

(ii)any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules, and

(b)in relation to the survivor of a member of an occupational pension scheme, at any time, any entitlement to benefits, or right to future benefits, which he has at that time under the scheme rules in respect of the member.

For this purpose, "right" includes a pension credit right.

17. He says that when the Scheme Rules did not suit them, the Trustees simply changed them and in his opinion the Trustees' action is not legal under section 67 of the Pensions Act 1995. As such his deferred benefit should be much higher.
18. He would like this point determined by me.
19. With regards to the detrimental reliance he experienced because he received benefit statements, which over stated his pension, Mr Squire has said the following:
- his divorce settlement in 1999 was finalised. He accepts that the marital assets were divided equitably. The intention between parties was to ensure that each party had a fair share. The benefit statement of 1999 was given to the Court led to a greater cash amount being agreed to be paid to his former wife. Had the true pension figure been known, he says he would not have agreed to pay the cash amount he did pay to his former wife;
 - as a result of being told that his Scheme benefits were £29,957 per year, he declined the opportunity to join other pension schemes when he had the chance to do. Further, he ran his own business and did not elect to have a pension because he felt his Scheme benefits would be sufficient;
 - as he was content with the pension amount quoted, he decided to retire from corporate life from May 2006; he felt he had enough pension built up with the Scheme; and
 - he incurred legal fees of £4,800 while complaining to the Trustees, and he would like this reimbursed.
20. He says that it has come to his knowledge that the Trustees have paid executive members benefits without "N/NS" adjustments and therefore they should be doing the same for him.

Summary of the Administrator's and Trustees' position

21. The Administrator has said:
- that in 2011 they realised the error and corrected it. They notified Mr Squire in 2012. They accept that initially Mr Squire was told that his deferred pension would be £32,408, however they are unable to explain why this figure was quoted;

- that no figures were supplied by Mr Squire setting out his financial loss. They do not agree that legal costs should be reimbursed when other free alternative services like TPAS are available to assist applicants; and
- Mr Squire has suffered a loss of expectation.

22. The Trustees have said:

- executive members who were deferred members of the Scheme prior to 14 February 1995 could have the whole pensionable service paid at 1/30th subject to N/NS adjustment. The 2006 Scheme rules were not intended to extend the scope of benefits awarded to executive members. It was a drafting error which led to the line from the 1995 Scheme rules remaining on the 2006 Scheme rules, when the 2006 Scheme rules should have stated a date of 14 February 1995;
- the Trustees sought to amend the Scheme rules rather than correct the mistake via court proceedings. The Trustees disagree with Mr Squire that he has subsisting rights within the Scheme which have been unduly amended by the Trustees. The Trustees do not accept that deferred benefits are due to Mr Squire on the basis he wants;
- the Trustees are disappointed that Mr Squire did not receive accurate benefit statements, which included the N/NS adjustment. The Trustees do not agree that Mr Squire to his detriment relied on the incorrect statements. He has not provided tangible evidence of his reliance;
- they do not agree that they should pay Mr Squire's legal costs. They say when the administrator contacted him regarding the error, they did refer him to TPAS. It was his choice to incur legal costs rather than contact TPAS;
- the Trustees had administered the Scheme throughout the period based on their understanding of the 1995 Scheme rules. It was only after the Trustees realised the error that they took action to amend the 2006 Scheme rules; and
- that no executive member has benefited from the drafting error. Further the Trustees have confirmed that from 2006 to 2013 there were no executive member retirements.

23. Legal opinion received by the Trustees in relation to the deed of amendment:
- the Courts would agree with the amendment if the matter were brought to them;
 - as the Trustees and Sodexo intended to only update the 1995 Scheme rules to reflect the changes of pension simplification (A-day), they did not intend to create a fresh entitlement regarding executive members;
 - to take the matter to court to rectify the Scheme rules, would have been a disproportionate use of funds in paying for costs when it was clear that an error was made and there was no intention to create an entitlement;
 - if the matter was challenged in court, they are confident that the Court would side with the Trustees because executive members were not told by the Trustees that as a result of the 2006 Scheme rules, their entitlement increased; and
 - any claim under section 67 of the Pensions Act 1995 will be defeated if such a claim was brought to the Court. Any subsisting right must be enforceable however as the Scheme rules were amended by Deed, then the incorrect entitlement cannot be enforced as it no longer exists.

Conclusions

24. The key issue which both parties want determined is the issue around how the 2006 Scheme rules were amended.

Deed of Amendment

25. The Trustees say that the 2006 Scheme rules contained an obvious error and it should have said “before 14 February 1995”. The Trustees add that they did not intend to create a fresh entitlement for executive members from 2006 onwards.
26. The reality is that the 2006 Scheme rules which were approved by the Trustees did not say “before 14 February 1995” and created an unintended entitlement for executive members who held deferred benefits before 2006 - that they could be entitled to 1/30th accrual rate for their entire service.
27. As it transpired, no executive member retired during this period (2006 to 2013), so no one actually benefitted from the error. But once it was brought to the Trustees attention, they needed to act and correct the Scheme rules. Rule 28, grants Sodexo, with the Trustees’ consent, authority to amend the rules:

“The Principal Employer, with the consent of the Trustees, may by deed to be executed by the Principal Employer and the Trustees cancel, amend or add to all or any of the trusts, powers and provisions of this Trust Deed and the Rules with retrospective, immediate or future effect...”

28. So there is provision within the Scheme rules, granting Sodexo authority to amend the Scheme rules, “by deed” with retrospective, present or future effect. As such, Sodexo, with the Trustees’ consent, amended the 2006 Scheme rules with a deed of amendment. But before doing so, the Trustees sought legal advice. The Trustees had the alternative option of going to court and seeking an amendment. Bearing in mind, as no member benefitted from the drafting error, the course of action taken by the Trustees and Sodexo was proportionate. Obviously, had members inadvertently benefitted then the Trustees may have needed to consider court action to amend the Scheme rules. I see no reason to interfere with the decision taken by the Trustees and Sodexo by amending the Scheme rules by a deed of amendment.

Section 67A of the Pensions Act 1995 entitlement

29. Mr Squire argues that the 2006 Scheme rules created an entitlement and thus his deferred benefits should be paid at the accrual rate of 1/30th. He says this has become his “subsisting rights” under section 67A, which cannot be altered by a deed of amendment.
30. Mr Squire’s argument that he had subsisting rights resulting from the 2006 Scheme rules would not succeed. Section 67A(6)(a)(ii) states; “any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules”. Mr Squire left service and his benefits “at that time” were calculated based on the 1995 Scheme rules. In that his ordinary membership will be based on an accrual rate of 1/60th and executive membership at 1/30th. Therefore his subsisting rights are based on the 1995 Scheme rules and those have not been affected.
31. Therefore, it is my view that Mr Squire’s benefits have been calculated correctly using the correct accrual rates and his subsisting rights have not been affected by the drafting error on the 2006 Scheme rules.

N/NS adjustment

32. Over a period of 13 years Mr Squire has received Administrator incorrect benefit statements from the Administrator. These statements were incorrect because the annual pension did not have the N/NS adjustment. Mr Squire says that there may have been other reasons. I disagree with him as there is no evidence to say that there were other reasons. The N/NS adjustment is an actuarial adjustment made against deferred member's benefits, to take into account actual service (N) against the service they could have accumulated had they not left (NS).
33. The Scheme rules, grant the provision to make the N/NS adjustment against executive member's Scheme benefits. The 2006 Scheme rules, under 3. Pension on early retirement, in Rule 8.3 (b) stated :
- “in respect of his Pensionable Service as an Executive Member shall be the prospective pension payable at Normal Pension Age as a result of the prospective period of Pensionable Service as an Executive Member projected to Normal Pension Age multiplied by the proportion that the period of Pensionable Service as an Executive Member actually completed to the date of leaving Service bears to the period of Pensionable Service as an Executive Member projected to Normal Pension Age.”
34. Rule 8.3(b) stipulates that members, who have left prior to normal retirement age, must have the “N/NS” adjustment applied to their benefits. The N/NS adjustment is as stated in the rule. “NS” is the “prospective pension payable at Normal Pension Age as a result of the prospective period of Pensionable Service”, whereas “N” is defined within the same rule as “the proportion that the period of Pensionable Service as an Executive Member actually completed.”
35. The Administrator did not apply this adjustment to the benefit statements Mr Squire received, but they should have done in order to ensure that Mr Squire's benefits are in line with the Scheme rules and an accurate reflection of his service. Their error has been corrected and Mr Squire is now aware of what his entitlement is within the Scheme.
36. But the provision of incorrect benefit statement over 13 years, may have led Mr Squire to make decisions which were detrimental for him. Mr Squire has stated that he did detrimentally rely on the incorrect benefit statements.

Detrimental reliance

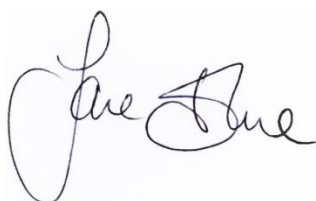
37. The Administrator had been issuing Mr Squire with incorrect benefit statements. This is not good administration and there is no dispute about this. But did Mr Squire rely on the benefit statements to his detriment?
38. Before addressing the issue of reliance, it is worth noting that the difference between the incorrect and correct statements was modest and unlikely to be a deciding factor in any decisions Mr Squire took. The incorrect benefit quoted was £29,957.04, whereas the correct benefit is £28,275.84. This is a difference of £1,681.20.
39. Mr Squire says that his divorce settlement was based on the pension statements supplied. The divorce may have taken into account all of his assets including his pension, but Mr Squire has not supplied sufficient proof to say that the settlement hinged on the incorrect pension statement. Mr Squire says he would have given his former wife less cash, but any settlement would have been negotiated between the two solicitors. Therefore, it is speculation that Mr Squire's former wife would have accepted a lower cash settlement than the amount she agreed. In any event, it is not for me to unravel the whole divorce settlement. Therefore, I am not persuaded that Mr Squire relied on the pension statement to his detriment when divorcing his wife.
40. Mr Squire says that he further relied on the statements and did not join other pension schemes and left executive employment in 2006. I am not persuaded that Mr Squire solely declined to join pension schemes including one with his own business because he held the expectation of receiving £29,957.04 from the Scheme. Any additional service or pension accrued within a new scheme would have complimented his retirement benefits. But Mr Squire took a conscious decision not to join the scheme. There is no proof that the incorrect statements were the sole reason why he opted against joining pension schemes and possibly benefitting from a higher combined pension.
41. Mr Squire adds that he left executive employment in 2006, because he relied on the incorrect statements supplied by the Administrator and decided that he did not need to continue to work. Bearing in mind, Mr Squire's Scheme benefits can be drawn from 2017 (his normal retirement date), the decision to stop working in 2006 in anticipation that his pension to be drawn in 2017, seems implausible. Had the decision to stop working been as a direct result of taking his projected

pension early at an incorrect level quoted by the Administrator, then Mr Squire may have had a case, but there is no such direct link.

42. Mr Squire felt aggrieved with the change of his benefits so he appointed Solicitors. But he did have alternative options which were free and he did not explore. Had Mr Squire exhausted all free services before engaging Solicitors then I may have considered his argument. As the appointment of the Solicitor was Mr Squire's decision, knowing that it would cost him money when other free services were available. Therefore, I will not direct legal costs to be paid.
43. As Mr Squire has not persuaded me that he has relied on the pension statement to his own detriment, I do not agree that the incorrect benefit statements should be paid to him as compensation.
44. However, I do recognise that the incorrect statements raised Mr Squire's expectation. As I have said, the N/NS adjustment has been a provision of the Scheme rules and the Administrator should have ensured that the statements issued were a reflection of Mr Squire's entitlement within the Scheme. Because the Administrator failed to monitor the accuracy of the statements, it is my view that they should pay compensation for raising Mr Squire's expectations. I typically direct modest amounts, but I have to take on board the fact that Mr Squire was given incorrect statements over a long period; hence my direction for distress and inconvenience will reflect this. I will direct the Administrator to pay £800 as compensation for the distress and inconvenience caused.
45. I will not direct the Trustees to pay compensation for distress and inconvenience as they were not aware until the complaint was brought to them that the Administrator were issuing incorrect benefit statements.

Directions

46. Within 21 days of this Determination, the Administrator is to pay Mr Squire £800 in compensation for distress and inconvenience.



Jane Irvine
Deputy Pensions Ombudsman
17 November 2014