

Ombudsman's Determination

Applicant	Mr Y
Scheme	Invensys Pension Scheme (the Scheme)
Respondent	Invensys Pension Trustee Limited (the Trustee)

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by Invensys Pension Trustee Limited

Complaint summary

2. Mr Y's complaint is that the Trustee has unfairly rejected his request for early retirement, because it says that he remains in significant gainful employment. Mr Y argues that he had not previously been informed of the criteria on which the Trustee decides the meaning of "significant gainful employment". He says that other members in similar circumstances have been allowed to retire early.

Background information, including submissions from the parties

3. Mr Y joined BTR Group Pension Scheme on 30 January 1994. In 2000, it became part of the Scheme, due to an amalgamation with Siebe Pension Scheme. Extract from BTR Group Pension Scheme Deed Amending the Employees Rules of 2 December 1995 (**the BTR Scheme Rules**).

'Retirement

Means retirement from significant gainful employment to the satisfaction of the Trustee...'

4. An extract from BTR Group's formal announcement letter of March 1995 (**the formal announcement letter**):

'Early Retirement

Members considering early retirement should be aware that, to be eligible to receive their pension, they must be retiring from significant gainful employment

unless they are retiring due to incapacity or redundancy or have passed their normal retirement age.'

5. The Scheme's Deed Amending the Employees' Rules of 25 March 2006, which was applicable at the time Mr Y became a deferred member in 2013 says that:

'Retirement

Means retirement from all significant gainful employment to the satisfaction of the Trustee and "retire" shall be construed accordingly.'

6. Extract from the Scheme Handbook 2014 (**the Scheme Handbook**).

'Deferred Pension

You may apply to start receiving your pension before your normal retirement age if you are aged at least 50 (and have ceased significant gainful employment)...

7. The Scheme's Deed Amending the Employees Rules of 22 August 2016 (**the Scheme Rules**) says:

'Retirement

Means retirement from significant gainful employment to the satisfaction of the Trustee...

8. Extract from the Scheme's 2018 Newsletter (**the Newsletter**).

'Early Retirement Rules

...The Scheme Rules allow you to retire before your normal retirement age, but you must satisfy certain conditions if you want your pension to be paid early...One of the conditions is that you must have retired from all significant gainful employment. This has always been a condition for members with a deferred benefit entitlement...

9. In 2013, Mr Y left employment and became a deferred member of the Scheme.
10. In February 2017, Mr Y contacted XPS (the Scheme's administrator, formerly known as PSAL Pensions Administration) to request an illustration of his retirement benefits.
11. On 1 March 2017, a sub-committee of the Trustee held a meeting at which the issue of significant gainful employment was discussed. The sub-committee was assisted by its legal advisers. The minutes of the meeting noted that:-
- There was no clear definition of significant gainful employment.
 - The Trustee was asked to define significant gainful employment so that the Scheme's Administration Team could process early retirements consistently for members.

- The Trustee's intention behind creating a definition was to allow the Scheme's funding level to be calculated on the assumption that members retired at their normal retirement date, whilst giving the Trustee discretion to permit early retirement for members who did not give up all paid employment.
 - The Trustee considered that significant gainful employment meant the higher of £5,000 a year or 50% of a member's full pension (**the Benchmark**).
12. On 8 March 2017, the chair of the Trustee's sub-committee emailed the Trustee setting out its recommendations that:
- employment generating pay greater than 50% of a member's pension should be considered significant, as retirement should indicate that the pension is a member's primary source of income;
 - a further income limit of £5,000 a year was appropriate to allow members with very small pensions to continue working; and
 - the Trustee should consider any related appeals from members.
13. On 9 March 2017, XPS forwarded a retirement illustration to Mr Y, together with an early retirement application form. On the same date, the Trustee passed a resolution that the Benchmark would be used as the limit for deciding whether members had breached the significant gainful employment Rule. The Trustee also authorised an amendment of early retirement application form to reflect this definition.
14. In April 2017, Mr Y submitted his completed application form to XPS with the intention of taking his pension early, aged 57. The normal retirement age (**NRA**) for the Scheme is 65. Mr Y also said, in writing, that he would like to retire due to health problems. The application form included a declaration that Mr Y was required to sign, confirming that he would have retired from significant gainful employment by the pension start date, but the Benchmark was not quoted on the form.
15. Mr Y says that this application form was not completed to the satisfaction of XPS and he was sent a new version of the form, which quoted the Benchmark.
16. Mr Y contacted XPS to query the Trustee's definition of the term 'significant gainful employment' under the Scheme Rules. XPS confirmed that the Benchmark was applicable.
17. In response, Mr Y told XPS that his planned employment once he had taken his pension would provide 'significant' income, with reference to the Benchmark. Consequently, the Trustee rejected Mr Y's application for early retirement.
18. Mr Y considered the Trustee's decision to be unfair, so he invoked the Scheme's internal dispute resolution procedure (**IDRP**). In summary his complaint was that:
- the correspondence he received from XPS of 9 March 2017 did not define what significant gainful employment means under the Scheme Rules. It was first

outlined in April 2017, after he had submitted further information to XPS, following his pension application;

- he thought that his application for payment of his benefits was made just before the Trustee implemented the Benchmark;
- he does not believe that the Trustee has provided sufficient notice before enforcing the Benchmark;
- this has not left enough time for him to rearrange his finances for his retirement planning, which has been ongoing for eight years;
- since 2009 he had been planning to reduce his working hours to 4 days a week;
- he had expected to be able to reduce his working hours and still claim his full pension before age 65; and
- other members have been allowed to take early retirement under similar circumstances.

19. The Trustee's response of 23 January 2018 stated that:

- the significant gainful employment rule has been in place since 1988. All members taking early retirement must declare that they will not be in breach of it;
- the Scheme Rules govern how the Scheme is run;
- if there is any discrepancy between the Scheme Rules and the information set out in the Member Booklet, the Scheme Rules will prevail;
- the General Section of the Scheme Booklet says 'The booklet is made available to help you and has no legal force. In the interests of simplicity this booklet does not refer to many of the minor qualifications contained in the Scheme Rules';
- following an enquiry from XPS in March 2017, the Trustee confirmed the Benchmark for the determination of significant gainful employment;
- this is to ensure that a member's pension is their primary source of income and that their employment earnings are not a significant part of their total income;
- the Scheme Rules stipulate that Mr Y's NRA is 65 and no member has an automatic right to take their pension early. Early retirement is at the discretion of the Trustee; and
- the Scheme does not have any provision for ill health retirement for deferred members.

20. Mr Y's complaint was not upheld

21. Mr Y was unhappy with this response and complained under stage two of the IDRP.

22. In response, the Trustee said:

- the significant gainful employment rule has historically been managed on an individual basis, with members self-certifying themselves without querying what the term means. This is consistent with the Scheme Rules;
- the Trustee retains discretion to consider individual early retirement cases but also has a duty to apply the Scheme Rules fairly and in the best interests of all its beneficiaries;
- the significant gainful employment Rule was not amended in 2017, the expectations of the Trustee were simply clarified for administration of the Scheme;
- by contrast to the findings at stage two of the IDRPs, there is provision under the Scheme Rules for early ill health retirement, at the discretion of the Trustee. However, this is only when evidence has been provided by a registered medical practitioner that a member is and will continue to be incapable of carrying out their occupation.

23. Mr Y's complaint was not upheld at the IDRPs 2nd stage.

24. **Mr Y's Position:**

- he would like to take his pension at age 60;
- the Benchmark was not communicated to him before his pension application was submitted;
- he believes the Trustee's enforcement of the meaningful gainful employment rule in accordance with the Benchmark is unfair; and
- the extent of his continuing employment will be a maximum of 30 hours a week and it will exceed the Benchmark in terms of both the 50% of full pension and £5,000 a year limit.

25. The Trustee has provided details of how previous enquiries about significant gainful employment were dealt with and what guidelines were in place before the current benchmark was established. In summary the Trustee said:-

- Before the introduction of the Benchmark, significant gainful employment enquiries were dealt with on an individual basis. The Scheme Rules allow Trustee discretion in this area, so the advice given to members was that any continuing employment must be considered insignificant. If the member was prepared to share details of their intended future employment, XPS could seek further guidance from the Trustee.
- The Benchmark was not put in place as a result of Mr Y's enquiry in April 2017. Following the closure of the Scheme in 2015, all members became

deferred and XPS received many enquiries about the meaning of significant gainful employment. Consequently, the Trustee passed a resolution on 9 March 2017, to provide additional guidance to XPS for dealing with these enquiries. This is when the Benchmark was established to determine if a member had breached the significant gainful employment Rule. Before this, the general approach was that most members were expected to stop work in order to claim their pension or reduce their working hours to a minimal level.

- Members have always been required to self-certify that they have retired from significant gainful employment. That remains the case when they apply for early retirement. The only change is that, due to an increase in early retirement enquiries, the Trustee provided guidance on what it considers to be significant gainful employment. The Trustee's response to Mr Y's enquiry was that he needed to self-certify that he has retired from significant gainful employment, which he felt unable to do. The Trustee understands that Mr Y intends to work 4 days a week after claiming his pension, and the Trustee does not consider this to be insignificant.

Adjudicator's Opinion

26. Mr Y'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:-

- Mr Y says he believed that by reducing his working hours, he would be allowed to claim early retirement. But the Trustee has consistently maintained that members are required to have left significant gainful employment, before claiming their benefits early.
- Before the Benchmark was put in place, enquiries on the significant gainful employment Rule had been dealt with on a case by case basis, with, on occasion, XPS seeking guidance from the Trustee. The Trustee has indicated that there was an increase in the volume of these enquires from 2015 and this led to the need to clarify the position for members.
- The Trustee has discretion over members meeting the requirement to have left significant gainful employment. The reasons for introducing the Benchmark were reasonable and relevant, and the correct Scheme Rules have been identified, correctly interpreted and applied. There is no evidence of irrelevant considerations. The Trustee's decision regarding Mr Y's application is within the range of outcomes that a reasonable body of trustees might make.
- Although the Trustee has not exercised its discretion in Mr Y's favour, that does not mean that he has been treated unfairly. The Trustee has acted within its powers in considering Mr Y's circumstances and in making its decision not to allow his application.

- Mr Y could have contacted the Trustee earlier, during the eight years he has been planning his retirement, to query its position on significant gainful employment. This would have allowed the Trustee to manage Mr Y's expectations and avert any issues he says he is now experiencing. But, as the Benchmark was only introduced on 9 March 2017, the same date as an application form and illustration were sent to Mr Y, the Trustee would not have been in a position to give Mr Y any notice of the Benchmark beforehand.
- Mr Y has confirmed that he intends to continue working a maximum of 30 hours a week, and that his earnings will be in excess of the Benchmark. The Trustee says that its approach to significant gainful employment has been to expect members to stop working or reduce their working hours to a minimal level. The Trustee required Mr Y to self-certify that he has not breached its guidelines for significant gainful employment. Having considered his own circumstances, Mr Y has not been able to self-certify, as required.
- The Trustee has the discretion to consider early retirement applications on an individual basis. The Trustee considered Mr Y's circumstances but did not feel able to exercise its discretion to award his benefits early. Mr Y has not provided evidence of different treatment between himself and other members in similar circumstances. Moreover, the Trustee says that it implemented the Benchmark to remove inconsistencies that had previously existed in the administration of early retirement claims.
- There is no evidence in support of Mr Y's complaint that the Trustee's reliance on the Benchmark has unfairly disadvantaged him, nor that he would have been allowed to claim early retirement before these limits were put in place.

27. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y 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 points made by Mr Y for completeness.

Mr Y's additional comments

28. Mr Y maintained his position that he has been treated differently to his colleagues. Before the Benchmark was implemented in March 2017, employees, who had reduced their working hours, had been allowed to claim benefits early. He says he does not know how he could provide evidence of this due to the confidential nature of this information.
29. The process of applying to take his pension started in February 2017, before the Trustee held a meeting to discuss the meaning of significant gainful employment.
30. Mr Y says the Scheme Rules are unclear on the outcome; what if a member retires then returns to employment, and their income then exceeds the Benchmark?

31. The Trustee has not taken into consideration his medical condition and reduced life expectancy, in deciding that he may not claim early retirement.

Ombudsman's decision

32. Mr Y says that he has been treated differently to other members who left before the Benchmark was implemented and who were allowed to claim their benefits early. However, Mr Y is unable to provide evidence of being treated differently because, as he rightly says, such matters are confidential. That being the case, it would not be possible for me to conclude that Mr Y has been treated unfairly, as compared to other members in a similar position to Mr Y. But in any event the Trustee has discretion on whether members have met the requirement to have left significant gainful employment. This means that the Trustee must individually consider each member's early retirement claim on its own individual merits, having regard to the Benchmark.
33. Mr Y contends that the process of applying to take his pension started in February 2017, before the Trustee held a meeting to discuss the meaning of significant gainful employment. The significant gainful employment Rule has been in force since 1988. Before the Benchmark was implemented applications were dealt with on an individual basis and members were required to self-certify that they did not breach the rule. Mr Y would have found himself in much the same position where he would have needed to justify that working 30 hours a week was not significant gainful employment. I find that the implementation of the Benchmark was not the main factor preventing Mr Y from receiving his pension early.
34. The Trustee has noted that Mr Y intended to work 4 days a week after taking his benefits early and did not consider that to be insignificant. It was for the Trustee to investigate Mr Y's individual circumstances and decide on the validity of his early benefits claim. The Trustee has considered the information Mr Y provided and concluded that he does not meet the requirement to have left significant gainful employment. It is within the provisions of the Scheme Rules for the Trustee to take this stance, and the Trustee has reasonably acted within its authority.
35. Mr Y says that the Trustee has not taken his medical condition and reduced life expectancy into consideration in deciding that his claim for early benefits should be rejected. But the Trustee has said that deferred members may make a claim for ill-health retirement. The Trustee also stated that it has discretion over such claims and that evidence would need to be provided by a registered medical practitioner that a member is and will continue to be incapable of carrying out their occupation. Consequently, it is for Mr Y to consider whether his circumstances meet those requirements, and if appropriate, seek the required medical evidence. The Trustee has shown that Mr Y's medical condition was considered and has explained the conditions under which Mr Y could make a claim for ill-health benefits.
36. Mr Y says the Scheme Rules are unclear on the outcome, quoting an example of a member taking benefits early then returning to employment with their income

exceeding the Benchmark. Members are required to self-certify that they have retired from significant gainful employment, before making a claim. That there is nothing more specific in the Rules on the position, should a member later breach that Rule, is irrelevant in Mr Y's case. Particularly, given that he found he was unable to self-certify that he had retired from significant gainful employment from the outset.

37. I do not uphold Mr Y's complaint.

Anthony Arter

Pensions Ombudsman
6 March 2020