

Ombudsman's Determination

Applicant	Mr N
Scheme	Innospec Limited Pension Plan (the Plan)
Respondent	The Trustees of the Innospec Limited Pension Plan (the Trustees)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Trustees.

Complaint summary

2. Mr N has complained that:-
 - Prior to his transfer of pension rights from the Interlox Pension Scheme (**the Interlox Scheme**) to the Plan in 1997, he was shown information which led him to believe that the Trustees had "crystallised" their discretionary pension increase practice in favour of applying the Retail Price Index (**RPI**) to pensions in payment. Mr N says that he transferred his benefits based on this understanding and that his pension in the Plan, payable since 2016, should therefore be increased annually by reference to the RPI and not the Consumer Price Index (**CPI**) (**the RPI/CPI complaint**).
 - The Trustees did not include the Additional Voluntary Contributions (**AVCs**) he made into the Interlox Scheme in their calculation of the pensionable service credit available to him in the Plan. He should consequently receive benefits for these AVCs on top of those agreed with the Trustees at the time of the transfer in 1997 (**the AVC complaint**).
 - The Trustees have improperly refused to provide him with the Plan information which he requested in 2016 and 2017 (**the disclosure complaint**).

Background information, including submissions from the parties

3. Mr N left Interlox Services Ltd on 31 December 1996 and became a deferred pensioner of the Interlox Scheme.
4. The Interlox Scheme is a non-contributory arrangement and does not require employee contributions from active members.
5. Mr N also paid AVCs to secure additional benefits in the Interlox Scheme.
6. On 10 January 1997, the administrator of the Interlox Scheme sent Mr N a deferred benefit statement showing that:-
 - His qualifying service in the Interlox Scheme was 5 years 1 month.
 - He was entitled to a deferred pension of £2,715.61 per annum at his date of leaving (**DOL**) which would increase by 5% a year (or the increase in the cost of living, if less) up to his Normal Retirement Date (**NRD**).
 - The cash equivalent transfer value (**CETV**) available to him was £16,190.
 - The current value of his AVCs was £12,276.14.
7. After joining the Plan in early 1997, Mr N considered transferring in his pension rights from the Interlox Scheme. The in-house Plan administrator informed Mr N, in a letter dated 5 February 1997, that he would be granted the following benefits in the Plan from the date of receipt of an “agreed transfer value”:
 - a credited pensionable service of 2 years 20 weeks;
 - a credited preservation service of 5 years 4 weeks; and
 - a contributions credit of £12,276.14.
8. The letter also explained that:-
 - Credited pensionable service was treated in the same way as actual pensionable service for calculation of benefits in the Plan.
 - Credited preservation service restricted Mr N’s right to a refund of contributions on leaving the Plan if this, together with his period of actual Plan membership totalled two or more years.
 - The contributions credit was the amount of his own contributions to the Interlox Scheme which would be paid over with the transfer.
 - The figures quoted were based on “a transfer value and relevant details” current at the date of this letter.

- The offer would expire on 28 February 1997, after which the figures quoted for credited pensionable service and contributions credit could change.

9. Prior to agreeing to the transfer, Mr N has said that he:

“...asked about the indexation of benefits and I was shown a copy of the Plan Rules and an extract of a minute showing a discretion agreed between the Trustees and the Company* in relation to pension increases. The Pensions Manager explained that this meant that the RPI up to 5% was guaranteed and that if the Plan made discretionary increases above this level, my benefits would increase more than if left in the Interlox Scheme. I relied on this information in subsequently agreeing to transfer my benefits to the Plan...”

*the Company is Innospec Limited, previously The Associated Octel Company Limited.

10. Mr N completed and returned the appropriate transfer form to the in-house Plan administrator.

11. On 30 September 1997, the in-house Plan administrator wrote to Mr N and confirmed receipt of the CETV and AVC fund available to him from the Interlox Scheme.

12. This letter also said that:-

- The terms set out in the letter of 5 February 1997 became “operative” from 24 July 1997 with one exception.
- His contributions credit was now £12,821.78 which was the actual AVC amount transferred into the Plan from the Interlox Scheme.

13. Mr N also contributed into the money purchase AVC scheme of the Plan (**the Plan AVC scheme**) while an active member.

14. On 28 February 1998, Mr N became a deferred member of the Plan and received a benefit certificate in March 1998 from the in-house Plan administrator showing that:-

- He was entitled to a deferred pension of £3,261.48 per annum from the “pension payment date” of 1 February 2016 up to his NRD of 1 February 2026 and a lower pension of £3,044.04 per annum thereafter.
- His deferred pension was “guaranteed” to increase at RPI subject to a maximum of 5% per annum during both deferment and in payment and the Company could award increases above this at its discretion.
- The benefits quoted included his transferred in pension rights.
- The value of his contributions to the Plan AVC scheme at DOL was £6,595.60.

- The benefits shown on this certificate were subject to the Plan Rules and legislative requirements in force at the time.

15. In his letter dated 19 March 2016, Mr N asked the Trustees to provide him with the information which they had relied upon to interpret the clause relating to pension increases in the Plan Rules back in early 1997. He said that:

“I repeat my request of 8 August 2011 for disclosure of the minute I was shown which specifically related to the previous discretion for this rule. Under the Occupational and Personal Pensions Scheme (Disclosure of Information) Regulations 2013 (**the Disclosure Regulations**) Schedule 3 Part 1 paragraph 3*, the Trustees are required to disclose this document as it documented the Trustees’ interpretation of the rules in the deed. I would also point out the trustee minutes in 1996 and 1997 show that in the administration report...the pension increases were applied using the interpretation of this minute...

The content of this minute was also contained in the administration procedures of the in-house pension team at the time I joined the company, so it should be readily available. I therefore formally request the release of the original minute, an extract of the admin reports relating to pension increases in 1996 and 1997 and an extract of the Plan administration guide...”

*This is set out in the Appendix.

16. The Plan administrator at the time, Aon, replied on 4 May 2016, as follows:

“The Trustees consider that disclosure of the requested information is not required under the terms of the Disclosure Regulations for the following reasons:

- The Trustees doubt that...minutes are covered under the terms of Schedule 3 Part 1 paragraph 3.
- More importantly, disclosure is required only where the requested information is relevant to your rights under the Plan (Regulation 11) **. As your transferred in benefits were provided on the basis of the Plan Rules (with the same pension increase provisions as the benefits you subsequently accrued within the Plan), any past practice in relation to the Plan benefits is irrelevant to the way in which the Trustees now provide pension increases in accordance with the Plan Rules...

You should not take this letter to mean that the Trustees agree with your reading of the position from 1996/1997...”

**This is set out in the Appendix.

17. Mr N was dissatisfied with this response and in his letter dated 9 June 2016 said that:

“...I refer you to your letter of 2 March 2011 relating to the Cost of Living Increases in which you specifically state that:

“The Rules do not specify RPI or any other specific measure of the cost of living. The Trustees have considered this with the help of their legal advisers and have concluded that, as in previous years, they will continue to follow the Government’s interpretation of cost of living.”

The Trustees are arguing that they continue to exercise an interpretation of the Rules...and I am therefore requesting a copy of this decision “to follow the Government’s interpretation of cost of living” ...

1. I specifically request a copy of the communication to members of changes to revaluation of pension benefits...and the minute of any decisions by the Trustees on the implementation of these changes to revalue benefits.
2. I also request that the Trustees confirm whether...these changes exercised by the Trustees have informed their interpretation that they are referring to in the communication of 2011.
3. Can the Trustees confirm whether there is other discretion documentation that has led the Trustees to this decision and if so, please provide a copy...?
4. If no such documentation exists can the Trustees confirm that their decision is based on a legal argument of a potential interpretation of the Rules alone, and whether the Trustees referred to previous announcements, or predominantly relied on the argument that the Rules override any other documentation?

For the Trustees to reach their decision in 2011 the Trustees would have needed to refer to the previous discretions of the Trustees on the assessment of pension increases. These documents relate to an interpretation of the Rules and by the Trustees own admission is a continuing commitment. Therefore, in accordance with Schedule 3, Part 1, paragraph 3, please produce whatever evidence of “relying on the Government’s interpretation of cost of living” ...

...I don’t agree with their position that they can choose to ignore previous discretions exercised by their predecessors especially where there is a clear estoppel argument on the basis of the transfer conditions offered and accepted. This transfer was only undertaken having made all reasonable endeavours to understand the interpretation of the pension increase rule...The documentation provided and the consistent interpretation from all the parties does not reflect the subsequent amended Trustees’ position in 2011. The Trustees present at the time of my employment had previously clearly endorsed a guaranteed position on future RPI increases both in a scheme minute and the way the administration reports that were compiled reflecting the annual pension increase...

The booklet contains specific wording as to the statement of guarantee, this was not an oversight but intent of the Trustees, to provide this benefit. Had the previous Trustees wanted to keep the ability to change its position then it could have agreed different wording for the booklet...and should have been advised by their legal representatives to do this.

I note that the Trustees have never denied that the minute referred to in my original letter of complaint does exist.

Finally, I confirm that while I have drawn my benefits for reasons relating to the Lifetime Allowance (**LTA**), I am not accepting that any CPI increase applied in April 2016 or at a future date is in fact the correct application of the Plan Rules and discretions previously exercised, relating to my accrued and transferred in benefits. I look forward to receiving the specific documents and answers to the points raised in this letter under the disclosure requirements.”

18. Aon responded in its letter dated 12 August 2016 to Mr N as follows:

“The Trustees... maintain their opinion that disclosure of the information requested by you is not required under the terms of the legislation you mention or under pension law more generally.

As you know, the Plan Rules require the Trustees to decide what the appropriate definition of “cost of living” should be, because no particular index is specified.

As you say, earlier communications have referred to a practice of following the Government lead, from the RPI into the CPI. Indeed, it was the Trustees’ past practice to follow the Government lead, and the Pensions Ombudsman has determined...that it was not “unreasonable” for the Trustees to do so.

Now, and in the future, the Trustees will review their interpretation of “cost of living” as it applies to the Plan Rules from time to time, and not in accordance with any policy or past practice.

The historical materials to which you refer in your letter are, therefore, irrelevant to the way in which the Trustees now provide pension increases in accordance with the Plan Rules...

The Trustees therefore do not therefore agree with your view that disclosure is required ...and as a result will not be providing you with the information requested.”

19. In September 2016, Mr N informed Aon that his Interlox AVCs did not appear to have been included in the calculation of his retirement benefits in the Plan. He said that:-

- His Interlox AVCs should have been transferred into the Plan AVC scheme to provide additional retirement benefits.

- The AVC value of £6,595.60 shown on the benefit certificate only represented the AVCs which he paid into the Plan AVC scheme while he was an active member of the Plan.

20. Aon replied in a letter of 6 February 2017 as follows:

“From the correspondence issued in 1997 and the administration records, it is clear the Pension Team were fully aware of your AVC fund of £12,821.78 when the credited pensionable service was determined.

The Plan Rules state that the Trustees may accept a transfer of assets and will provide such benefits as it decides are appropriate, after considering the advice of the Actuary. The member then makes a decision based on the benefits quoted, as to whether they wish to proceed with the transfer.

The letters dated 5 February and 30 September 1997 clearly set out the benefits you would receive in respect of the transfer from the Interlox Scheme. We...can find no evidence to substantiate your claim.”

21. In his letter dated 6 June 2017 to Aon, Mr N made a subject access request (**SAR**) for the following information:

- correspondence relating to his transfer of benefits from the Interlox Scheme;
- the Trustees’ interpretation on how transferred in benefits, including AVCs, were treated in accordance with the Plan Rules;
- correspondence between the Plan Actuary and the in-house Plan administrator concerning the transfer of pension rights both before and after it took place including (a) the calculation of the added years benefits for the CETV and his Interlox AVCs and (b) the decision made to treat his Interlox AVCs as a contributions credit only; and
- a copy of the Trustees’ minutes mentioned in the pension administration guide applicable at the time of the transfer which showed how pension increases would be applied to (transferred-in) pension benefits in the Plan.

22. In response to Mr N’s SAR, Aon sent him a letter dated 23 June 2017 which said that:

“You have made this request in the context of Pensions Regulator’s guidance to pension scheme trustees and recommending certain principles for their decision making.

The Regulator’s guidance post-dates, by over 20 years, yours and the Trustees’ decision to make a transfer from Interlox Scheme to the Plan.

Given the time difference, the Trustees have taken the view that the Regulator’s guidance is irrelevant to the current circumstances. Clearly, the guidance was not in force or applicable at the material time...

The Trustees will not, therefore, be providing you with access to the information you request, for the following reasons, in particular:-

- Correspondence, and any application form, which might be present within historical records...are practically inaccessible now and...cannot be shown without showing at the same time other members' details.
- A SAR will not be applicable to any trustee interpretation of value, or actuarial advice addressed to the Trustees. Nor will it apply to Trustee minutes.
- In any event, you were provided with a statement of your prospective benefits which (in the absence of any evidence to the contrary) would be expected to follow and be consistent with the Trustees' view and any actuarial advice addressed to them..."

The Trustees' position

23. In accordance with the current Plan Rules, they are required by rule 19.2 to pay pension increases each year at "the increase in cost of living" selected by them, subject to an upper limit of 5%. In recent years, they have followed the Government lead in considering an increase based upon the CPI to be the appropriate measure.
24. At the time of Mr N's transfer of pension rights in 1997, the Plan was governed by the version of the Plan Rules dated 11 July 1995. In accordance with clause 19B of those rules, the Committee, appointed by the Company under clause 23, was required to increase pensions annually by an amount equal to the "increase in the cost of living", subject to an upper limit of 5%, as determined by it.
25. The nature of the Committee's obligation to determine the "increase in the cost of living" was discretionary and trustee-like. It was not possible for such a regular and recurring decision to be "crystallised" which would have effectively fixed a particular cost of living index to the Plan.
26. The "contributions credit" figure of £12,821.78 as shown in the letter of 30 September 1997 did not confer an entitlement on Mr N to have an AVC fund in the Plan in addition to the 2 years 20 weeks of pensionable service credit granted.
27. An "administration record run" on 11 November 2016 for Mr N identified his Interlox AVCs as "member basic" rather than AVCs in the Plan. This would indicate that Mr N's Interlox AVCs were used to determine the credited pensionable service available to him only.
28. Mr N did not raise questions about his AVCs in the Plan until around 20 years after he transferred his pension rights from the Interlox Scheme. He had been sent regular AVC benefit statements and it is reasonable to expect that he would have queried the AVC figures shown much earlier if he believed that they were incorrect.

Mr N's position

29. Mr N says that:

“Much has been made of the Committee’s obligation to determine the “increase of cost of living” in a trustee-like discretionary manner but...there has been no evidence presented of any periodic review...which supports the position that the Trustees and company management...had exercised a discretion which guaranteed the pension increase basis unless a further discretionary increase was requested.

...the term “guarantee” was used in both the Plan documents and communications from the Company...the Trustees’ legal adviser...should have raised questions about the validity of these statements well before the UK Government decided to change its indexation approach to CPI. These statements in a benefit transfer situation are crucial and need to be clear, accurate and unambiguous. At no point have...the Trustees ...denied the understanding of the in-house pensions team who were happy to use a copy of the...minute as evidence that a discretion had been exercised with Company consent.

- 30. The Plan Rules clearly state that AVCs should be invested separately from the other assets of the Plan to provide additional retirement benefits. It is therefore reasonable to expect that his transferred in AVCs would have been invested in the Plan AVC scheme along with the contributions which he had paid directly into it.
- 31. The £12,821.78 value of his Interlox AVCs transferred into the Plan was higher than figure of £12,276.14 used by the Trustees to determine his pensionable service credit in the Plan. He did not receive any credit for the additional AVCs, and the Trustees have not been able to satisfactorily explain why the AVC figure increased. The Trustees, in his view, are “in breach of the Plan Rules” by accepting extra AVCs and not providing additional benefits to him in the Plan.
- 32. If his Interlox AVCs had been included in the calculation of the credited pensionable service of 2 years 20 weeks, this should have been made clear in the letter dated 5 February 1997. It would also have been apparent from the Plan Actuary’s calculations if this was the case.

33. He also says that:

“...when my benefits came into payment, I was asked to find all my prior AVC statements. At this point it became clear to me my transferred AVCs were not included in my leaving service AVC statement in 1998, only those contributed during my time there...”

34. After leaving the Company, he was very busy in a new job involving a lot of travel and caring for his family at home. He quite reasonably did not therefore have any time to study the AVC statements sent to him which he “only filed initially”.

35. As the Trustees have refused to disclose the Plan information which he asked for, even after making a SAR, he cannot find out whether his Interlox AVCs were included in the calculation of his credited pensionable service. If they have been, he should receive compensation for the Interlox AVCs of £545.64 (with interest) which were not used to purchase credited pensionable service for him in the Plan. If not, the whole Interlox AVC fund of £12,821.78 (with interest) should now be made available to him by the Trustees to secure additional retirement benefits in the Plan.
36. There has been “a clear and established pattern of breaches of law and deliberate refusal of information requests by the Trustees” since 2011.
37. He does not agree with the reasons given below by the Adjudicator that the RPI/CPI complaint and the AVC complaint cannot be investigated by me in accordance with regulation 5(3) of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations (SI 1996/2475) (**the Regulations**).
38. The subject of the AVC complaint should be that when he retired in February 2016, the Trustees improperly failed to provide him with AVC benefits based on the current value of the contributions credit which in September 1997 had been £12,821.78. He considers that the “act or omission” therefore took place in February 2016.
39. The Trustees have breached section 67 of the Pensions Act 1995. If discretion has been exercised to provide benefits in a pension scheme for a member, he/she acquires a subsisting right to them. Any exercise of a power in breach of section 67 is voidable. The Trustees should not be allowed to modify the basis for benefits payable and then “rely on time as a factor to excuse their behaviour”.
40. The date on which the Trustees breached their contract with him on the RPI/CPI complaint, in his view, was also his retirement date in February 2016. It was at this point that the Trustees exercised their discretion to increase his pension in the Plan annually in line with the CPI and not the RPI.
41. He disagrees with the Trustees’ statement that the minute which was shown to him by the Plan manager in 1997 does not exist.

Adjudicator’s Opinion

42. Mr N’s complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustees. The Adjudicator’s findings are summarised below.
43. The initial jurisdiction decision to accept Mr N’s complaint for investigation in full had been based upon the information available at the time, but on the understanding that it would be kept under review as the investigation proceeded.
44. Having carefully considered all the evidence submitted by the parties involved, the Adjudicator concluded that two aspects of Mr N’s complaint, that is his RPI/CPI complaint and AVC complaint, did not fall within The Pension Ombudsman’s (**TPO**)’s

jurisdiction and the Ombudsman could not provide a remedy in respect of these aspects of the complaint.

45. Regulations made by Parliament impose time limits on complaints which may be investigated by the Ombudsman. Regulation 5 of the Regulations states:

5-Time limit for making complaints and referring disputes:

(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable.

The AVC complaint

46. For Mr N's AVC complaint, the event complained about occurred in 1997. It was in 1997 that Mr N joined the Plan and that was when the Trustees allegedly did not pay his Interlox AVCs into the Plan AVC scheme. The "act or omission" therefore occurred around 22 years before his complaint was submitted to TPO in May 2019. The complaint has been submitted to TPO outside the three-year time limit for complaining to the Ombudsman as provided in Regulation 5(1).
47. Mr N has confirmed that his Interlox AVCs were not included in his "leaving service AVC statement in 1998". He has also stated that on departure from his previous employer and considering his busy international work-related travel schedule in his new role, he initially filed his benefit statements, but he did not monitor them, and he did not notice the error until years later. In the Adjudicator's opinion, if Mr N had examined his benefit statements, he would have known, or ought reasonably to have known, of the alleged problem with his AVCs in 1998. This meant that the latest date on which he could have made an application to me regarding that particular matter was during 2001 and his complaint was therefore also submitted to me outside the time period stipulated under Regulation 5(2).
48. When deciding whether it would be reasonable for the Ombudsman to exercise his discretion to investigate the AVC complaint under regulation 5(3), the limitation

periods stipulated under the Limitation Act 1980 (**the Act**), is a relevant factor which the Ombudsman must take into account.

49. As the AVC complaint is one which a Court would recognise as a claim made in negligence, the relevant period within which a claim has to be made is six years of the negligent act or omission (section 2 of the Act); or (if later) within three years from the date of knowledge (section 14A of the Act). This is subject to an overriding time limit (long stop) of 15 years from the date when the negligent act or omission occurred (section 14B of the Act). If there has been a deliberate concealment of the facts relevant to the claim in negligence, limitation did not start to run until the concealment is discovered or could have been discovered (section 32), but there is no evidence of concealment on the facts of this case.
50. For the purposes of the Act, time, in respect of the AVC complaint, started to run from 1997 when Mr N transferred his pension rights in the Interlox Scheme to the Plan. Therefore, if Mr N had pursued this matter through the Courts, he would have needed to have brought his claim within six years from 1997, that is, by 2003. In the Adjudicator's view, it did not appear that Mr N could argue that he had no knowledge of the relevant facts within the primary limitation period of six years. In any event, he would have needed to have commenced his claim within 15 years from 1997, that is, by 2012. TPO received the complaint on 6 May 2019, which was around seven years outside the long stop period.
51. It was, therefore, the Adjudicator's opinion that the AVC complaint was statute barred and that the Ombudsman would be unable to provide a remedy. This was in accordance with the Court's decision in *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198 (Ch). In that case, the Court held that the powers available to the Ombudsman, when investigating a complaint that was statute barred, were the same as those which are available to the Courts under the Act, except in cases of pure maladministration. The remedy must not go beyond what a Court could order.
52. This was not a case about pure maladministration as it involved the alleged infringement of a legal right based in negligence. This negligence claim was statute barred for the Courts and because the Courts were unlikely to provide a remedy, neither could the Ombudsman.
53. Since the AVC complaint was out of time for the Courts on the long stop, the Ombudsman was unable to exercise his discretion under regulation 5(3) of the Regulations.

The RPI/CPI complaint

54. Mr N has complained that in 1997 he was informed that his pension in the Plan was guaranteed to increase in payment at the same rate as the RPI, indefinitely. He has said that this was the deciding factor in transferring his Interlox Scheme benefits to the Plan.

55. Mr N's RPI/CPI complaint was one about misinformation/misstatement provided in 1997, and the cause of action in such a complaint is one a Court would recognise as a complaint based in negligence. Mr N had also submitted his RPI/CPI complaint to TPO outside of the 15-year limitation long stop for negligence-based claims given that the subject of the complaint occurred in 1997. As the Court was unlikely to provide Mr N with a remedy in respect of this issue, given the limitation issue, neither could the Ombudsman.
56. Furthermore, during 2011, the Trustees informed all members of the Plan, including Mr N, in an announcement, that it would continue to follow "the Government's interpretation of the cost of living", which had changed to CPI, to pay pension increases in the Plan.
57. This meant that even if the alleged misstatement was ongoing while the Trustees continued to use RPI as the measure of the cost of living for pension increases and referred to RPI pension increases in the Plan documents, as the change to CPI was made in 2011, the RPI/CPI complaint is outside the six-year limitation period for negligence claims.
58. In the Adjudicator's opinion, Mr N did not have a viable claim in contract. Mr N was made aware in 2011 that the rate of pension increases was changing from RPI to CPI. Even if he could show that by 1997 a contract guaranteeing RPI increases had been established and there was a breach of the contract terms as to pension increases in 2011, limitation in contract started to run from the date of the breach. Under section 5 of the Act, Mr N therefore had six years from the date of the breach to commence a claim.
59. Mr N consequently had until 2017 to make a claim in contract and until 2014 to complain to TPO. He only made a complaint to TPO in 2019. As a claim in contract is statute barred for the Courts, under Arjo Wiggins' principles, the Ombudsman will not be able to provide a remedy.
60. The Adjudicator considered whether there were other possible legal bases for Mr N's complaint that were linked to that change in 2011, or when his pension became payable in 2016.
61. Mr N had said that in 1997, he was provided with the Plan Rules and shown a set of Trustees' minutes describing a discretion agreed between the Trustees and the Company on the interpretation of the Plan Rules in relation to pension increases.
62. His position was therefore: (a) the Trustees decided to permanently exercise their discretion to use RPI for pension increases; and (b) the discussions he had at the time of the transfer of his Interlox Scheme benefits to the Plan amounted to an estoppel, which now prevents the Trustees from not using RPI as the "cost of living" index to increase his pension in the Plan.
63. The Trustees' view was that the current Plan Rules and those in force at the time of Mr N's transfer to the Plan did not specify either RPI or CPI as the "cost of living"

index to be used for determining pension increases in the Plan. They argued that this gave them discretion to choose an appropriate index. In recent years, the Trustees have followed the Government's lead in adopting CPI as the appropriate measure of increase. The Trustees have said that, as their decision was discretionary, it was not possible for this discretion to be crystallised by making a specific cost of living index a fixed term of the Plan.

64. In the Adjudicator's view, the Trustees' position was supported by the Plan Rules. There was no evidence that would lead to the conclusion that the Trustees had permanently decided to exercise their discretion to use RPI for pension increases.
65. Estoppel could not create enforceable rights and was not a cause of action in itself. So as far as a claim to Court was concerned, Mr N would need to show that he had a cause of action in respect of which he was arguing estoppel as a defence. The underlying cause of action to which a defence of estoppel would attach was negligent misstatement. Even if Mr N could establish negligent misstatement, the claim would now be out of time. In the Adjudicator's view, Mr N did not therefore have a viable estoppel argument available to him.

The disclosure complaint

66. Mr N has complained that the Trustees improperly refused to provide him with the Plan information which he requested in 2016 and 2017. In the Adjudicator's view, this element of his complaint was within the Ombudsman's jurisdiction on time grounds and could therefore be investigated.
67. Mr N contended that in accordance with Schedule 3 Part 1 paragraph 3 of the Disclosure Regulations, the Trustees were required to disclose the information which he requested in 2016. This information included the minute which he has said was shown to him by the Plan manager prior to his agreement to proceed with the transfer of pension rights from the Interlox Scheme. The Trustees had refused to do so because, in their view, provision of the information requested was not required under the Disclosure Regulations, or under pension law more generally.
68. In the Adjudicator's opinion, Mr N's 2017 request for information about how his Interlox AVCs were treated in the Plan was reasonable. Mr N wished to check whether the retirement benefits which he was receiving from the Plan had been calculated correctly and the Trustees' refusal to comply with his request for information, prevented him from doing so.
69. In the Adjudicator's opinion, the Trustees' failure to provide the information which Mr N requested in 2016 and 2017 was maladministration on their part and his disclosure complaint against the Trustees should therefore be upheld. Further, the Adjudicator stated that the Ombudsman would likely require that, to put matters right, the Trustees should provide Mr N with the Plan information which he requested in 2016 and 2017.
70. The Trustees accepted the Adjudicator's Opinion and responded as follows:-

- They have no record of the minute which Mr N says the Plan manager showed him in 1997 stating that pensions in the Plan would effectively be guaranteed to increase in line with the RPI up to a maximum of 5% per annum.
- The CPI did not exist as an index until 2003.
- The information request which Mr N made in 2016 was nearly 20 years after the completion of the transfer. They no longer held any details, including the correspondence between the Plan Actuary and the in-house Plan administrator at the time, of the transfer.
- It is generally required to only retain records for six years. Records can be kept for longer if they remain relevant and the Pensions Regulator has recently issued guidance on this.
- With the benefit of hindsight, it would have been helpful in this case to still have copies of the Plan Actuary's correspondence concerning Mr N's transfer and how the benefits available to Mr N from the CETV and his Interlox AVCs should be calculated. The decision not to have kept this information for longer than necessary was reasonable though. A pension transfer is a single transaction. It is "reasonably expected that any transferee (such as Mr N) would review his transfer terms, and the resultant benefit statement, both prior to transfer and then shortly thereafter, to check that the terms were as agreed."
- They did not have an "interpretation" on how transferred in benefits, including AVCs, were treated in accordance with the Plan Rules.
- They consider that they have satisfied their record keeping obligations under section 49 of the Pensions Act 1995 and its associated regulations but note that findings of fact in relation to these record keeping obligations are outside my jurisdiction. They understand that the record keeping obligations are monitored by the Pensions Regulator, rather than by me.

71. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion that the AVC and RPI/CPI complaints are statute barred for the reasons the Adjudicator has given, but I do not agree that the Trustees have committed any maladministration; I note the additional points Mr N has raised.

Ombudsman's decision

72. Mr N considers that I can investigate his AVC and RPI/CPI complaints under Regulation 5(3). For essentially the same reasons provided by the Adjudicator, I have decided that these complaints do not fall within my jurisdiction, and so I am unable to provide a remedy. In relation to the exercise of my discretion under Regulation 5(3),

this would not be appropriate in a case like this where there is a valid limitation defence, and I am unable to provide a remedy.

73. I do not consider that the Trustees' refusal to provide the information which Mr N requested in 2016 and 2017 amounts to maladministration on their part.
74. Mr N considers that the Trustees should have disclosed the minutes to him on the basis of Schedule 3, Part 1, paragraph 3 of the Disclosure Regulations, because the minutes document the Trustees' interpretation of the Plan Rules and the minutes supplement the Plan Rules.
75. Mr N is unable to provide sufficient evidence that the minutes in question were in existence at the time of his transfer. He has said that the Plan manager showed him the minutes in 1997, but I have not seen documentary or other evidence supporting this position, and I note the Trustees have said that they have no record of the minutes in question.
76. The disclosure obligations set out in the Disclosure Regulations specify that the relevant documents are documents that supplement or alter in any way the information contained in the documents establishing the pension scheme and the scheme rules. In my view a minute of a Trustee meeting at which it was discussed how it might choose to exercise its discretion would not "supplement or alter" the documents establishing the Plan or the Plan Rules. In this case, no evidence has been provided as to the existence of the document in question, and therefore for the purposes of the Disclosure Regulations, I do not consider that the Trustees have an obligation to disclose such documents even if their existence had been sufficiently proved.
77. Further, the Trustees have provided Mr N with their reasons as to why, in 2011, they reached the decision that CPI was the appropriate index for the calculation of pension increases. The Rule regarding pension increases under the current Plan Rules and the Plan Rules in force at the time of Mr N's transfer are similarly worded. I do not consider that it would have been possible for the Trustees to reach a decision in or around the 1990s which effectively binds them and their successors to permanently exercise discretion in a certain way.
78. I do not uphold the disclosure complaint against the Trustees.

Anthony Arter

Pensions Ombudsman
8 January 2021

APPENDIX

The Occupational and Personal Pensions Schemes (Disclosure of Information) Regulations 2013

Part 4 Information to be Given on Request

11 Constitution of the scheme

- (1) The information listed in Part 1 of Schedule 3 must be given to a relevant person* in accordance with this regulation where the relevant person makes a request for the information.

*relevant person means members, prospective members, their spouses and civil partners; beneficiaries; and recognised independent trade unions.

Schedule 3 Information to be Given on Request

Part 1 Information on the constitution of the scheme

- 1 The contents of any trust deed or document under which the scheme is made.
- 2 The scheme rules.
- 3 The contents of any documents that supplement or alters in any way the information referred to in paragraphs 1 and 2.