

Ombudsman's Determination

Applicant	Mr N
Scheme	Dengie Crops Limited Staff Pension Scheme (the Scheme)
Respondents	Dengie Crops Limited (Dengie)

Outcome

1. Mr N's complaint against Dengie is partly upheld. To put matters right (for the part that is upheld) Dengie should, within 28 days, provide Mr N with a Special Member Letter setting out all the Scheme benefits to be provided to him as set out in his letter of 16 May 2016.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N has complained that his pension benefits have not been correctly documented and that there are a number of areas where there is doubt concerning the benefit to be provided. Mr N has highlighted the following areas where he requires clarification:
 - whether he has copies of all of the documents that govern the Scheme in his possession;
 - the level of pension that should be reduced if he were to retire between the ages of 60 and 65;
 - the calculation of Final Pensionable Salary and the inclusion of car allowance; and
 - the purported change in the escalation rate in 2002 to change the escalation rate to RPI capped at 5%.

Mr N has not received the Special Member Letter that was agreed would be prepared for him.

Background information, including submissions from the parties

4. Mr N has been employed by Dengie since June 1987 and initially joined a Management Pension Scheme on 1 July 1987.
5. The Scheme was established by a deed dated 15 June 1987 and the Management Pension Scheme was amalgamated into the Scheme on 1 July 1988. The formal rules of the Scheme were adopted in 1993. Dengie is both the Principal Employer and Trustee of the Scheme.
6. Mr N says that he has been trying to establish since 2011 the pension benefits that would be payable to him at retirement, or to his wife in the event of his death. Mr N has not been able to establish the benefits payable and how these have changed since the Scheme was first established.
7. Dengie has confirmed that it would agree to Mr N's retirement after age 60 if he wished to retire early before age 65. Mr N has requested that this provision and the other provisions of his Scheme pension entitlement are confirmed in a Special Member Letter so that there should be no doubt as to the benefits to be provided. The Special Member Letter has not been provided to Mr N.
8. Mr N has referred to a number of documents and announcements that have been provided to him and raised a number of questions in relation to these. The main issues that are to be resolved are those that have been set out in paragraphs 1 and 2 above and cover the following areas.

Governing Documents

9. Mr N had previously asked for and received a number of documents relating to the Scheme. Mr N also asked to be provided with any documents that related to the Scheme that he had not previously seen. There was however a reference in a letter to this service dated 23 April 2015 that said an attached "Document II" included those governing documents that Mr N had not seen, but no documents were attached. Mr N has asked for clarification that Dengie should either provide the missing documents or confirm there are no further documents to be provided.

Pension reduction on early retirement between ages of 60 and 65

10. Mr N has asked how much of his pension should be reduced if he were to retire between age 60 and 65. The normal retirement age for men under the Scheme at outset was age 65. In 1991, following the Barber v GRE ruling, Dengie issued an Announcement dated 4 June 1991 (the 1991 Announcement) which explained some of the background to the Barber v GRE decision and said:

"Although it is permissible to provide different pensions for men and women to reflect that they are retiring at different ages it is not permissible to provide different pensions if they are retiring at the same age. This is the case at present whereby a man retiring at say 60 would receive a smaller

pension due to the reduced period of service but would be further reduced by the application of an early retirement factor to reflect payment of the pension from 60 instead of 65.

The company have therefore decided to amend the rules of the scheme to comply with the legislation but at the same time they wish to provide more flexibility for all employees who may wish to retire between the ages of 60 and 65. In future the normal retirement age under the scheme will be 65 for men and women but if employees wish to retire between 60 and 65 the early retirement factor will not be applied to the reduced pension. This means that women who still wish to retire at 60 will receive a pension no less than the pension they would have received previously and men will receive a slightly improved pension on early retirement in line with that received by a woman.”

11. The early retirement provisions remained unaltered until the 1993 Rules were adopted. Rule 5B of the 1993 Rules says that a member can retire before normal retirement age with the consent of the Employer and that his pension at retirement will be reduced to reflect early payment on a basis certified as reasonable by an actuary. Rule 5B was amended on 13 April 2004 and says for a Member who joined the Scheme before 1 July 1991:

“if retirement is on or after attainment of age 60 and before the Normal Pension Date, any part of the pension accrued in respect of Pensionable Service before 1 July 1991 in the case of a female Member and between 17 May 1990 and 1 July 1991 in the case of a male Member will be calculated using the Member’s Final Pensionable Salary at age 60. This part of the Member’s Pension shall be increased for the period from attainment of age 60 until the date of actual retirement on a basis certified as reasonable by an actuary.”

12. Dengie say that if Mr N were to retire at, say age 61, his pension would be calculated as:

- (a) For service up to 16 May 1990 – a pension reduced for early retirement on a basis certified as reasonable by the Scheme actuary.
- (b) For service between 17 May 1990 and 1 July 1991 – a pension based on the pension calculated at age 60 but increased for late retirement on a basis certified as reasonable by the Scheme actuary.
- (c) For service between 2 July 1991 and the date of the 1993 Rules (24 August 1993) – a pension unreduced for early retirement.
- (d) For service from the date of the 1993 Rules to the date the Scheme closed – a pension reduced for early payment on a basis certified as reasonable by the Scheme actuary.

13. Mr N says that he believes the pension in respect of all service, from the date he joined the Scheme on 1 July 1987 to 24 August 1993, should not be reduced. Prior to the adoption of the 1993 Rules the Scheme was governed by announcements. The 1991 Announcement says that men and women can retire from age 60 with a pension unreduced and there is no mention of consent.
14. Mr N has provided extracts of booklets that were also prepared during this time and although there is no date of issue Mr N believes these were issued after the 1991 Announcement. The first extract is a booklet for 'Male Senior Staff' and says that on Early Retirement "Your pension will be calculated as a deferred pension reduced because it is paid earlier than your normal retirement."
15. The second booklet is also for Male Senior Staff but for those joining after 1989 (presumably from 1 January 1990). For Early Retirement the booklet says "Any time after the age of 50 with our consent".

Calculation of Final Pensionable Salary and the inclusion of car allowance

16. Mr N initially complained that Dengie was not using the correct definition of Pensionable Salary to calculate his pension and that this should include his car allowance. Dengie have confirmed that the Pensionable Salary under the Rules means total earnings received from the employer during the last tax year, including basic salary or wages and any profit related pay, overtime, commission or bonuses but not including any benefits in kind.
17. In or around 1999 Mr N agreed to forgo the provision of a company car for a car allowance. He says that this car allowance should be included in the calculation of Pensionable Salary. Dengie say that it was agreed at the time that the car allowance would not form part of his Pensionable Salary as it was granted in lieu of a benefit in kind. Dengie have referred to a note made by the Payroll Department at the time which says that the car allowance is not pensionable.
18. Mr N says that he believes that Dengie did not appreciate that his consent was required to amend the definition of Pensionable Salary that would apply in his case. He never consented to the car allowance being non pensionable as he was never asked to give his agreement. Therefore, no matter how sensible it might seem now, he thinks his car allowance is pensionable in accordance with the Trust Deed and Rules. Dengie say they never gave their consent for the car allowance to be pensionable.

The purported 2002 change in the escalation rate to RPI capped at 5%.

19. Mr N says that no documentation has been provided to show that an amendment was actually made in 2002 to change the pension escalation rate to RPI capped at 5%. The initial explanatory literature attached to the 1987 Trust Deed allowed for the escalation of GMPs only at 3% a year.

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20. The 1991 Announcement said that pension increases would, from 1 July 1992, be at the rate of 5% a year compound on that part of the pension in excess of the GMP.
21. The 1993 Rules includes a power for the Principal Employer to alter or add to the Rules in writing and “upon making such alteration or addition the Principal Employer shall give written notice thereof to the Trustees.”
22. On 21 June 2002 a letter was written by a director as a Trustee of the Scheme to Dengie saying:

“I am writing on behalf of the Trustees of the above scheme to confirm that with effect from 1 July 2002 pension increases in payment will become 5% or RPI if lower (Limited Price Indexation).”
23. On 18 March 2005 the Principal Employer amended the rules with effect from 6 April 2005 and said that “a pension in payment that is attributable to pensionable service on or after 6 April 2005 ... will increase by 2.5% compound (or in line with the percentage increase in the retail prices index if less) each year.”
24. Dengie have confirmed that details of the amendments in 2002 or 2005 were not provided to the membership and have apologised for this, but say this does not invalidate the amendments.
25. Dengie say that as result of the above Mr N's pension will be increased at the following rate:
 - (a) For pensionable service up to 1 July 2002: 5%;
 - (b) For pensionable service on or after 1 July 2002: RPI capped at 5%
 - (c) For pensionable service on or after 6 April 2005: RPI capped at 2.5%
26. Mr N says that there never was a rule amendment in 2002 and therefore the 5% fixed escalation should apply to his benefits until at least the rule amendment in 2005. Furthermore, Mr N considers that the failure to inform him of a reduction in his remuneration package is a breach of confidence and trust and it was effectively giving him a pay cut but not telling him about it.

Adjudicator's Opinion

27. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by Dengie. The Adjudicator's findings are summarised briefly below:

Governing Documents

- Mr N has the right to see and be provided with copies of the documents that govern the Scheme. Mr N has compiled a significant number of the governing

documents himself and Dengie should either confirm that there are no further documents or provide those missing documents.

- Dengie subsequently confirmed that it had provided Mr N with all of the documents that govern the Scheme.

Pension reduction on early retirement between ages of 60 and 65

- There is no dispute that Mr N was admitted to the Scheme as a Male Senior Staff Member with a normal retirement age of 65. There are however differences of opinion over the position on early retirement and whether Dengie's consent is required and whether the pension should be reduced for pensionable service before 23 August 1993.
- The booklets that Mr N has presented do not give a definitive statement but do help to clarify the position. Although Mr N says that he believes these were not issued until after the 1991 Announcement, these were, on the balance of probabilities, issued before the 1991 Announcement. The latter booklet (the 1989 booklet) was specifically for Male Senior Staff joining after 1989. One of the changes in this booklet was to reduce the rate of accrual for those joining after 1989 and it would have been issued sometime during 1989 for those new Male Senior Staff.
- The 1989 booklet introduced a new requirement for Male Senior Staff to seek consent for early retirement. But the other booklet which seems to be specifically for those who joined before 1990, such as Mr N, set out a higher rate of accrual and there is no mention of consent being required. Therefore this requirement was not brought in for those members such as Mr N who joined before 1990 and before adoption of the 1993 Rules.
- The 1991 Announcement which following the Barber judgment was introduced to give "more flexibility for all employees". The 1991 Announcement did not make any reference to consent being required for early retirement but this did not alter the position for those joining after 1989; they still required consent to retire early in respect of all their pensionable service. The position is different for Mr N as all of his pensionable service prior to 23 August 1993 can be taken without consent.
- The 1991 Announcement also changed the provisions for early retirement and said that the company had decided to amend the rules to comply with the legislation and at the same time introduce more flexibility. If the company had simply wished to comply with the legislation then they would have equalised the normal retirement age for males and females at age 65 and also equalised male members' pensions between 17 May 1990 and 1 July 1991. In that instance Mr N would only be entitled to a pension calculated on the basis as set out in paragraph 12 above.
- But the company went further and said:

“...if employees wish to retire between 60 and 65 the early retirement factor will not be applied to the reduced pension. This means that women who still wish to retire at 60 will receive a pension no less than the pension they would have received previously and men will receive a slightly improved pension on early retirement in line with that received by a woman.”

- This wording shows that the intent was to remove the early retirement reduction for retirement between age 60 and 65 for both males and females and there was no distinction made for service prior to the Barber window. Thus Mr N does have the right to take all of his pension for service up to 23 August 1993 on an unreduced basis and without the need to obtain consent.
- The position changed with the adoption of the 1993 rules. The early retirement factors were confirmed as being subject to actuarial review in the 1993 rules. The early retirement reduction factors were not hardwired into the Rules or booklets and as such the members did not have to be notified of the changes. It is also not a requirement of the Disclosure of Information Regulations to advise members of these changes and in practice the early retirement pension is not a guaranteed right until a formal application is made and Employer consent has been given, and only then when the pension has been calculated.

28. Mr N and Dengie have confirmed that they accept the Adjudicator’s Opinion in respect of this section.

Calculation of Final Pensionable Salary and the inclusion of car allowance

- The car allowance is non pensionable. When Mr N was provided with a car it was clearly a benefit in kind and so would not have been pensionable. When Mr N agreed to give up a car and take an allowance instead the position did not change, other than the benefit in kind was no longer the physical provision of a car but a cash allowance. It was not part of Mr N’s salary for pension purposes, nor could it be deemed to be overtime or bonus as it was purely paid to replace a benefit in kind.
- Mr N says that he never gave his consent to the car allowance being non pensionable as he was never asked, although he has said that if he had been asked he might have agreed that the car allowance was non pensionable. But it was not necessary for Mr N to give his consent to the car allowance being non pensionable, it was for Dengie to agree and confirm it was pensionable. If, as seems likely, the position was never discussed this would not have altered the position that the car, or car allowance, was a benefit in kind and was non pensionable.

The purported 2002 change in the escalation rate to RPI capped at 5%

- Mr N says that there was no rule change in 2002 to change the rate of pension increase for pensionable service after 1 July 2002 to RPI capped at 5% as there is no written documentation to back this up. The only documentation that has been produced is the letter from the director as a Trustee to confirm that the amendment had been made.
- The flow of information between Dengie and the Trustee is complicated as they are one and the same, as the company acts as Trustee. So, in this instance, Dengie and the Trustee are saying that, even though they are unable to produce a written direction from Dengie as the Principal Employer, the rule amendment should be taken as made because of the confirmation of the amendment from the Trustee. Dengie have also confirmed that the amendment in 2002 and the rule change in 2005, were not communicated to the members but those oversights do not invalidate the changes.
- It is true that a non-disclosure of the rule changes to the members does not invalidate them but the question that needs to be answered is whether it is reasonable to assume that Dengie advised the Trustee in writing that a rule amendment was to be made in 2002. It is quite clear that the Trustee confirmed that the rule amendment had been put in place and, on the balance of probabilities, it is more likely than not that there was a written instruction made to the Trustee to change the rule. Therefore, it is reasonable to conclude that the 2002 rule amendment is valid.

29. Dengie have confirmed that they will provide Mr N with a Special Member Letter and include all of the items he has requested in his letter of 16 May 2016.
30. Mr N did not accept all of the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N and Dengie provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr N for completeness.

Ombudsman's decision

31. I will confine my decision to the two areas where Mr N disagrees with the Adjudicator's Opinion. These are:

Calculation of final pensionable salary and the inclusion of the car allowance

32. Mr N says he cannot understand why a portion of his salary which is a cash payment is excluded from the calculation of final pensionable salary. A benefit in kind is by definition a non-cash payment and it is clear from the rules that an increase in salary is included. He and Dengie agreed that he would forgo the benefit of a company car for an increased salary.

33. I agree that the traditional definition of a benefit in kind is that it is a non-cash payment whereby the employee gains some additional perk or fringe benefit through his employment. But that traditional view has become somewhat blurred in recent years with the advent of such things as flexible benefits and the ability to replace some benefits with a direct increase in salary.
34. I do not disagree that the car was replaced by an increase in salary or car allowance but the crucial point is that it was never agreed that this element of salary would be pensionable. Furthermore, it is clear from the information provided by Dengie that Mr N has not paid pension contributions on this increased salary or car allowance.
35. Mr N argues that the absence of an agreement that it was non pensionable means that it is pensionable. I disagree and concur with the Adjudicator's Opinion that because the question of whether the car allowance was pensionable was never discussed it effectively remained a benefit in kind and, on the balance of probabilities, it was never intended that it would be pensionable. Therefore, I do not uphold this element of Mr N's complaint.

The purported 2002 change in the escalation rate to RPI capped at 5%.

36. Mr N says that he does not understand how the Adjudicator concludes that an amendment was made in 2002. In the absence of any piece of paper which refers to an amendment being made to the rules he cannot accept that an amendment was made. There was no mention of the word 'amendment' in the letter and it said "increases in payment will become 5% or RPI if lower."
37. The letter from the Trustee to Dengie of 21 June 2002 said:

"I am writing on behalf of the Trustees of the above scheme to confirm that with effect from 1 July 2002 pension increases in payment will become 5% or RPI if lower (Limited Price Indexation)".

The lack of a piece of paper or use of the word 'amendment' does not necessarily invalidate the rule change. Indeed given the length of time that has elapsed since 2002, I do not find it surprising that any letter from Dengie requesting the amendment cannot be found. I can therefore only look at the information available and decide, on the balance of probabilities, what was the likely sequence of events.

38. There is clearly a letter from the Trustees which, in writing, confirms that pension increases will be limited. The use of the word "confirm" to me signifies that there must have been a request from Dengie to change the pension increases to Limited Price Indexation from 1 July 2002. It would be surprising if the Trustees took this decision of their own initiative. Therefore, on the balance of probabilities, I find it more likely than not that Dengie did issue a notice in writing to the Trustees before 1 July 2002 to change pension increases to Limited Price Indexation from 1 July 2002.
39. The Trustees therefore acted on the instruction and wrote to confirm that Limited Price Indexation would come into effect from 1 July 2002. I do not find the lack of the

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word amendment or the phraseology in the letter strange as Mr N would imply. The letter is clear that the change had been actioned and would apply from 1 July 2002, a future date. Therefore, I do not uphold this element of Mr N's complaint.

40. For completeness I would also confirm that Mr N should be provided with the Special Member Letter he has requested and make the following direction.

Direction

41. To put matters right I direct that within 28 days Dengie should issue a Special Member Letter to Mr N setting out all the pension benefits to be provided to him under the Scheme as requested in his letter of 16 May 2016.

Anthony Arter

Pensions Ombudsman
30 September 2016