

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

Applicant	Miss Kim Hunter
Scheme	Marks and Spencer Pension Scheme (the Scheme)
Respondent(s)	Marks & Spencer Pension Trust Ltd (the Trustee)

Subject

Miss Hunter complains that the Trustee has applied the state benefit deduction from age 65, even though she will not receive her state pension until age 66.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against the Trustee because there has been no maladministration. The Trustee has dealt with Miss Hunter's pension in accordance with the Scheme rules, which states that her state pension age is her 65th birthday. In addition, the Trustee did not provide her with inaccurate or misleading information.

DETAILED DETERMINATION

Material Facts

1. Miss Hunter's date of birth is 20 February 1958. She was employed by Marks and Spencer (the **Company**), but left their employment in 2000. During this time she was a member of the Scheme. Once Miss Hunter left employment, she became a deferred member of the Scheme.
2. The Scheme rules (the **Rules**) have been revised on a number of occasions over the years. At the time when Miss Hunter left employment in 2000, the Rules then in force were set out in the amended Rules dated 6 May 1998 (the **1998 Rules**) which took effect from 1 January 1997.
3. Rule 5.1 of the 1998 Rules said that on retirement at or after Normal Retirement Date, a member would be paid a pension equal to 1/45 of their final pensionable salary for each year of service "less the State Pension Deduction".
4. The State Pension Deduction was defined as

"an amount equal to 1/40th of the Basic State Pension for each complete year of Pensionable Service...However, the amount of the State Pension Deduction will not exceed an amount equal to the greater of:

 - (a) one quarter of the pension to which the Member would otherwise be entitled; and
 - (b) the Basic State Pension."
5. Under Rule 9, a deferred member with more than two years' service was entitled to a pension from Normal Retirement Date calculated as described in Rule 5.1.
6. The Normal Retirement Date under the Scheme is the last day of the month in which the member's 65th birthday falls. This was the same for both males and female members.
7. Rule 16.2 states that the application of the state pension deduction will not take effect until the member reaches state pension age (**SPA**).
8. SPA is defined as meaning the rules in paragraph 1 of Part 1 of Schedule 4 to the Pensions Act 1995 – which is 65 for both men and women born after 6 April 1955.

9. The effect of the Rules was that where a member received their pension under the Scheme before reaching SPA they would receive their pension in full, but once the member starts to receive their state old age pension, the amount of state old age pension received by them would be deducted from the pension paid to them under the Scheme.
10. By a Deed dated 20 September 2011 (**the 2011 Rules**), the Trustee modified the Rules, replacing the existing definition of SPA with a new definition:
 - i. for members who left service before 17 May 1990, pension age means, for a woman her 60th birthday, and for a man, his 65th birthday;
 - ii. for members who left after 17 May 1990 but before 1 January 1997, pension age means

for service before 17 May 1990, for a woman her 60th birthday and for a man his 65th birthday

for service after 17 May 1990, the meaning given in the Pensions Act 1995 as originally enacted; being for a man, his 65th birthday and for a woman, an age between her 60th and 65th birthday, depending on her date of birth, as set out in a table;
 - iii. for members who left service after 1 January 1997, the same meaning as in paragraph ii above;
 - iv. for a member who falls within paragraph ii and has service both before and after 17 May 1990, the Trustee may, with consent of the Company, make such estimates as they think appropriate in respect of each such period.
11. The change was expressed to be by way of clarification, and to have effect only as consistent with the power to change the Scheme within the Rules and so as not to adversely affect any subsisting rights pursuant to section 67 of the Pensions Act 1995.
12. A letter from the Trustee dated 6 November 2006 to Miss Hunter giving her an estimate of the pension payable to her from her 60th birthday states that the estimated figure will be reduced by a state pension deduction on 28 February 2023 when she reaches SPA.

13. In a letter dated 8 September 2009 from the Trustee, Miss Hunter was informed that the pension she chooses would reduce when she reached SPA.
14. Miss Hunter retired in 2010 and was informed by the Trustee, in a letter dated 12 February 2010, that her pension will reduce when she reaches SPA, on the first payment date after 1 March 2023.
15. On 26 September 2011 the Trustee wrote to Miss Hunter informing her of the change in SPA made by the government in 1995, which would change the age at which she would receive her state pension to somewhere between age 60 and 65. They said that the deduction relating to the state pension would be made at SPA as defined in the Rules. This meant that the deduction would be applied to her pension on the date set out in the Rules, i.e. between the ages of 60 and 65 as detailed in a table (the **First Table**) that was attached in the letter. Another table (the **Second Table**) was attached which showed the proposed changes by the government to when she would receive her state pension. The First Table showed that for dates of birth from 6 April 1955 the state pension deduction would be made at age 65. The Second Table showed that based on her date of birth her state pension would be paid from her 66th birthday.
16. Miss Hunter complained to the Trustee. She said that she was aware of the changes made by the government to the SPA. She was also aware that in her case the state pension deduction under the Scheme would be applied at age 65, but that was when 65 was the SPA. She did not agree that she should be penalised by the Trustee by having the state pension deduction applied before her state pension is paid. She did not feel that she was being treated fairly by the Trustee and was being financially penalised as the state pension deduction was being made before she received her state pension and not at the same time as she was previously advised. She said that all previous documents she received stated that the state pension deduction would be applied when she reached SPA. So if she did not reach SPA until age 66, how can a deduction be made at age 65?
17. The Trustee responded on 5 March 2012 stating that it had a legal duty to administer the Scheme in accordance with the Rules. The Rules clearly state that the state pension deduction must be applied at age 65. Together with the Company, it considered the impact that the government's proposal would have

on the Scheme and decided that the Rules would not be amended to reflect the revised ages at which members receive their state pension.

18. Miss Hunter's complaint was dealt with under the Scheme's internal dispute resolution procedures (**IDRP**). The Trustee wrote to Miss Hunter on 16 March 2012 saying that in order for her claim to succeed she would need to prove that she relied upon her belief that the state pension deduction would be made at age 66. In addition, she would need to show that she would suffer an actual financial loss. The Trustee outlined for her examples of proof she would need to provide in both instances, i.e. reliance and financial loss.
19. Miss Hunter responded on 27 March 2012 enclosing copies of the letters the Trustee had sent her on 6 November 2006, 8 September 2009 and 12 February 2010. She said that all these letters state that her pension would be reduced when she reached SPA. In addition, all the letters state that her SPA was still at age 65. As the government had changed the rules and she would not be receiving her state pension until age 66 and she assumed that the deduction would be delayed until she reached 66. She would be in a financially worse position as once she is 65 the state pension deduction would be made from her pension and she would be expected to live on this drop in her annual income through no fault of her own. She was not prepared to give details of her income and expenditure per month as she thought that it was totally irrelevant to the point she was making. She had made all her financial decisions believing that she could manage on her pension, taking into account the state pension deduction from her pension, but this was based on a SPA of 66.
20. The Trustee considered Miss Hunter's complaint under IDRP and did not uphold it. It said that when the government proposed amending the SPA, it did conduct a review of the Rules as to whether or not this meant that the date at which the deduction would take place should also move to a higher age. Having taken legal advice, it was clear that the definition of SPA within the Rules did not change the date when the deduction should be made. In order for her complaint to be upheld, she would need to demonstrate that she had suffered an actual financial loss. Taking all the information she had given into account, it did not feel that she had sufficiently demonstrated either reliance or actual financial loss.

Summary of Miss Hunter's position

21. She says that the Trustee did not clarify the situation to her until 2011, and it was only in 2011 that she was made aware of the fact that the state pension deduction would be made and consequently have a full year when her income would be significantly reduced.
22. She agrees that she did not provide any evidence of reliance or of actual financial loss suffered as she thought that the actual amount was obvious – it is the state pension deduction.
23. Her reason for not sending details of her income and outgoings is that she did not feel it is relevant for the Trustee to know her personal income at this time, as this will not reflect her income when she reaches SPA. She believes that her income would be much lower by then, and subsequently lower still for a year, if the Trustee goes ahead with its plans.
24. Another reason why she did not provide details of her income, was because she did not see how there could be any doubt that she will be in financial hardship for a year. Her financial hardship will be £2,875.91, based on the figures provided by the Trustee in February 2010. She truly believes that the state pension deduction should only take place once she is in receipt of her state pension.
25. While she admits that she may not fully understand the Rules, she has not read any documentation that details the new SPA of 66 that applies to her or anything that allows the Trustee to make the state pension deduction before she receives her state pension.

Summary of the Trustee's position

26. It acknowledges that at various times Miss Hunter had been provided with communications to the effect that the state pension deduction would be applied from SPA and which have referred to the date which is her statutory SPA.
27. It is well established that the provision of incorrect, incomplete or misleading information does not in itself give rise to any entitlement in excess of that which applies under the Rules. All the documents sent to her are summary documents and not documents which could reasonably be expected to confer any such entitlement.

28. It acknowledges that in some cases, a member may be able to demonstrate that he or she acted upon information provided, that it was reasonable for the member to do so and that the member has suffered actual financial loss in respect of which it may be liable to compensate the member. This does not, however, amount to a requirement for it to honour the information given.
29. Miss Hunter has not provided any evidence of reliance or actual financial loss. She has referred to an impact on her income and standard of living, but has not provided any specific evidence that she has taken action in reliance on the information provided which she would not otherwise have taken.
30. Miss Hunter has also talked in general terms of loss – but it is clear that this is by reference to her disappointed expectations rather than as compared to the position she would have been in if she had been given correct information throughout regarding the date at which the state pension deduction would be applied.

Conclusions

31. This is one of a number of complaints brought by female members of the Scheme about the date when the state pension deduction will be made.
32. Although not referred to as a bridging pension in the Rules, the way pensions are paid under the Scheme is in effect a form of bridging pension – an additional amount is paid to members who retire and start receiving a pension from the Scheme before reaching SPA. When they become entitled to their state pension an amount equivalent to the basic state pension is then deducted from their Scheme pension, so that they continue to receive the same amount of pension overall.
33. The position under the Scheme is that a deduction is made from the member's Scheme pension when they reach SPA (as defined in the Scheme Rules), which is referred to as the "State Pension Deduction". For members who left service before 17 May 1990, this happens at age 60 for women and 65 for men. That is because those were the respective state pension ages in force at that time and it was then permissible to have different pension ages for men and women.

34. As a result of the decision in the Barber case, from 17 May 1990 it was unlawful to have different retirement ages for men and women. All pension schemes were required to equalise the retirement age for male and female members. But they did not have to do this immediately – schemes were allowed a period of time (known as the ‘Barber window’) to equalise the retirement ages for men and women.
35. For members who left service before 17 May 1990, the Scheme applies the state pension deduction at age 60 for women and 65 for men.
36. What was not foreseen at the time was that there would be further changes to state pension age; the government has made – and is continuing to make – changes to the state retirement age, which will continue to increase (indeed it has recently announced that the state pension age will increase to 67 on a date between 2026 and 2028 and it will continually review the retirement age in light of the increase in people's life expectancy).
37. The outcome of these changes is that the definition of SPA for the purposes of the Rules has not kept pace with changes in the statutory SPA. So Miss Hunter now has a SPA of 66 and will receive her basic state pension on February 2024, but she continues to have a SPA under the Rules of 65. The result of this is that her state pension deduction will be taken in 2023 when she reaches 65. So there will be a gap of one year when her Scheme pension will be reduced but she will not yet be receiving her basic state pension.
38. Miss Hunter has not alleged that she is the victim of unlawful discrimination. However, I have received a number of complaints from members of the Scheme about the state pension deduction, each raising different but related issues. During the course of the investigations into these complaints a number of issues arose, including the question of whether there was unlawful discrimination between men and women. I considered that point in another case, where my determination was issued on 10 October 2013 (PO-304 Thew). My conclusions are set out in detail in that published determination and there is no need for me to go through them again in detail.
39. It follows from my conclusion in Mrs Thew’s complaint that Miss Hunter’s has not suffered unlawful sex discrimination, but there remains the question of whether her pension has been dealt with in accordance with the Rules.

40. This question turns on the definition of SPA and, thus, the date at which the state pension deduction should be applied. Miss Hunter understandably says she took this to mean the age at which she would actually receive her state pension. However, the starting point for determining a member's benefits is always the Rules, so the definition must be that set out in the Rules.
41. In the 1998 Rules, it is clear that the deduction only comes into effect when the member reaches the age at which they become entitled to their state pension.
42. There was clearly an intention to smooth pension income – the purpose of the Rule is to ensure that the amount of pension received stays the same regardless of whether any state pension is being paid; no deduction is to be made that is greater than the actual state pension. Although amended by subsequent Deeds, there is nothing in the later Deeds that specifically overrides this. Indeed, the 2009 Rules again say that for members in Miss Hunter's situation, the deduction is not to be taken until the Member reaches state pension age.
43. That leads to the next question, which is what her SPA is.
44. The Trustee says that the reference should be interpreted as being to the state pension arrangements in force at the time of the 1998 Rules – in other words, age 65.
45. That ignores the clear intention of the Rules to ensure that the deduction only applies to money payable through the state pension. The clear intention is to maintain a level pension both before and after the state pension comes into payment. Otherwise, there would be no point having this Rule at all. The language of this Rule itself does therefore suggest a contrary intention – it says the deduction should be ignored until the member is entitled to their state pension and should then be deducted to reflect the amount of pension they will receive. Looked at in this way, the language of the Rules is clear in saying the deduction is specifically designed to reflect the state pension a member receives. Accordingly, it should only be deducted when they receive their state pension.
46. However, Miss Hunter left service in 2000. She then became a deferred member and her benefits crystallised then. She was entitled to a deferred pension under Rule 9, which would be paid to her when she reached Normal Retirement Date.

At that point, her Normal Retirement Date was defined in the 1998 Rules – in other words the pension payable from her 65th birthday.

47. So, the 1998 Rules make it clear that Miss Hunter's Normal Retirement Date is her 65th birthday. It follows that at the point she left and became a deferred member in 2000, her pensionable age – both for the state pension and for the purposes of this Scheme – was 65.
48. The effect of all of this is that, although there was an intention to 'smooth' pensions, this was designed to take effect from the date at which members became entitled to their state pension. Miss Hunter became entitled to this at age 65. Accordingly, the Trustee is correct to say that is the relevant age.
49. Miss Hunter's existing right under the 1998 Rules was to have the state pension deduction made when she would become entitled to her state pension; which at that point would be when she reached age 65.
50. The fact that the state retirement age has subsequently changed does not mean that the Rules are no longer valid. The legislation changing SPAs does not automatically extend to all references in the Scheme documents; the state pension deduction is not written in terms that require it automatically to track any later changes in the state pension.
51. The complaint as put to me by Miss Hunter is that this is a change to the Rules. She is deeply upset by the fact that the Trustee can apparently change the Rules at any time to reduce her pension. There has not, however, been a change to her entitlement under the Rules. The position is that her SPA for the purposes of the Scheme is, and always has been, age 65. The 2011 Rules did not change this; they merely clarified what her entitlement was. The only thing that has changed is the information that has been provided to her. Up to 2011 that information was not sufficiently clear, but since 2011 the information provided has been correct.
52. However even though the information up to 2011 was not sufficiently clear, I cannot see that she was given incorrect information. Both the letters of 6 November 2006 and 12 September 2010 informed her that her pension would reduce as from February/March 2023 – her 65th birthday.

53. I therefore find that the Trustee has dealt with Miss Hunter's pension in accordance with the Scheme Rules; her pension should be reduced from the date when she would reach SPA, as defined in the various Rules. This is the clear intention of the Rules.
54. The Trustee is correct that misleading or inaccurate information does not in itself create a legal entitlement; a member is only entitled to the pension due to them in accordance with the rules of their scheme. But the provision of inaccurate or misleading information is maladministration.
55. If Miss Hunter can show that she relied on the information to her detriment, she may pursue a claim in respect of any loss she has suffered as a result. The Trustee requested evidence from her to consider this point but she declined to provide it.
56. Miss Hunter says that the reasons for not providing the information requested by the Trustee are because she it was not relevant for the Trustee to know her personal income at this time, as it would not reflect her income when she reaches SPA and that it was obvious that her financial loss was £2,875.91 which is state pension deduction. While I can appreciate her reasons for not wishing to provide the information, any decision I make has to be based on the evidence submitted. The Rules the state pension deduction is applicable from age 65, therefore I am unable to find that she has suffered a loss equal to it because she would not be receiving her state pension until age 66.
57. The letter in November 2006 from the Trustee to Miss Hunter informs her that her pension would be reduced by the state pension deduction on 28 February 2023, i.e. the end of the month following her 65th birthday, when she reached SPA. The letter in September 2009 also informs her of the reduction in her pension at SPA, but does not give a date as to when this may be. The letter in February 2010, at the time she retired, once again tells her about the reduction at her SPA and says that this would be made on the first payment after 1 March 2023, i.e. the first of the month following her 65th birthday.
58. I can see no correspondence from the Trustee to Miss Hunter telling her that her pension would be reduced as from her 66th birthday. I am therefore unable to find that she was given inaccurate or misleading information.

59. For the reasons given in paragraphs 46 to 58 above, I do not find that there was maladministration on the part of the Trustee and therefore do not uphold Miss Hunter's complaint.

Jane Irvine
Deputy Pensions Ombudsman

10 September 2014