

Ombudsman's Determination

Applicant	Mr S
Scheme	The GCP UK Pension Plan (the Plan)
Respondent	GCP Applied Technologies UK Limited (GCP)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by GCP.

Complaint summary

2. Mr S' complaint is that GCP discriminated against him by failing to grant discretionary increases under the Plan, from March 2016 onwards, on the pension benefits he accrued before 6 April 1997 (**his pension**).

Background information, including submissions from the parties

3. Mr S was employed by W.R.Grace Ltd (now GCP) from August 1966 to 1 January 1995. He was a member of the Plan, then called the Grace UK Pension Plan, from that time. He started to draw his pension in January 1995, when he took redundancy and early retirement.
4. When Mr S left the Plan, the Supplemental Definitive Deed and Rules, dated 24 February 1988, (**the Deed and Rules**) applied to his pension. The Deed and Rules provided for increases to Guaranteed Minimum Pensions (**GMPs**) from 6 April 1988, in accordance with legislation. In addition, Clause 14 of the second schedule (**Clause 14**) for discretionary pension increases stated that:

"Any pension or annuity currently payable out of the Plan shall be reviewed from time to time by the Principal Employer having regard to the rise in the Index and the financial state of the Fund and may from time to time be increased by such amount and at such time as the Principal Employer at its discretion acting on the advice of the Actuary, shall decide."

"Index" means the Government Index of Retail Prices or such other index considered suitable by the Trustees..."

5. Mr S' pension included a GMP for the benefits he had accrued from 6 April 1988 to December 1994. This GMP received and continues to receive statutory increases. The pension benefits Mr S accrued from 1966 to 1988, were increased at GCP's discretion under Clause 14. Relevant extracts from the Deed and Rules and information about GMPs are set out in Appendix 1.
6. After Mr S left the Plan, the government introduced statutory increases for pensions earned after 6 April 1997 through the Pensions Act 1995 (**PA 1995 statutory increases**). These increases were incorporated into the Plan and are set out in rule 7 of the Definitive Trust Deed and Rules, dated 21 March 2018 (**the 2018 Rules**). Relevant extracts are set out in Appendix 2. These increases do not apply to Mr S' pension.
7. On 28 October 2018, Mr S complained to the Trustees of the Plan (**the Trustees**). In summary, he said:-
 - He had read the 2017 annual report and the Plan newsletter (**Pension News**) and was concerned that GCP had decided not to award any discretionary increases for pensions.
 - He noted that the Plan remained in a strong funding position, with a surplus of approximately £8m, an improvement from £7.7m in 2017. So he questioned why GCP had said that it would not provide any discretionary increases. He was one of a group of pensioners with service before 6 April 1997 (**pre 1997 service**), who were not eligible for the PA 1995 statutory increases and were being unreasonably discriminated against.
 - There had been no discretionary increase in his pension since 1999, and there was a reduction in its real value.
 - When he joined the Plan, he had understood that pensions would be increased in line with inflation and the 1998 booklet for the Plan (**the 1988 Plan Booklet**) stated that GCP was making provision for increases to pensions accrued before 6 April 1997.
 - Since 1999, the three yearly review process had consistently failed to agree an increase, but before then, GCP had awarded discretionary increases from 1 January 1987 to 15 January 1999, of between 3.5% and 10.7%, a year.
 - In support of his complaint, Mr S referred to information provided by the Trustees, as set out in Appendix 3.
8. The Trustees replied to Mr S on 12 November 2018, and explained that his complaint would be referred to GCP because pensions were increased at GCP's discretion.
9. On 5 December 2018, GCP responded to Mr S' complaint. GCP said that it had received requests from other pensioners for discretionary increases for pre 1997 service and had conducted a thorough review. The Plan actuary (**the Actuary**) had advised that there would be a "significant negative financial impact on the Plan" if

discretionary increases were awarded and that no increase was possible, now or in the near future.

10. On 17 December 2018, Mr S replied that:-

- It was unreasonable and unjustified to discriminate between pensioner groups just because the UK government required the company to provide increases for a defined group of pensioners under the PA 1995 statutory increases. This was not a reason to arbitrarily refuse to give increases to others.
- The statement that to provide an increase would have "...a significant negative financial impact on the Plan..." was at odds with the positive statements about the Plan funding in the latest Pension News.
- Pension News also stated that increases were reviewed every three years, but it was now nearly twenty years since the last increase, so this review process was cosmetic and unlikely ever to recommend an increase.
- GCP should provide a copy of the actuary's report, minutes of the three-yearly review meetings and confirmation of whether money was ever put into the Plan in order to provide increases for pensions with pre 1997 service as set out in the 1988 Plan Booklet.

11. On 7 February 2019, GCP replied to Mr S and said:-

- It had conducted a thorough review and had taken great care in deciding to not award increases after the latest review.
- Although the Plan's funding position had improved, GCP's primary aim was to support the Trustees in securing benefits already guaranteed to members.
- Recent surpluses in the Plan had been used to increase the security of those benefits by buying insurance policies for pensions in payment. If the surplus were used to pay discretionary increases for around nine hundred pensioners, the security of the Plan might be put at risk and it could fall into deficit.
- The Actuary had advised that there would be significant negative financial impact on the Plan if discretionary increases were awarded. It was not appropriate for GCP to release the Actuary's full report or the minutes of the review, but the three yearly reviews were undertaken in good faith and with an open mind.
- GCP did not know what the policy on pension increases was in 1988. But it was not its current policy to fund discretionary increases in the Plan. Such increases had always been discretionary. This meant, in case law, that GCP's discretionary power was not fiduciary and it could consider its own financial interests in deciding whether to award and fund discretionary increases.

- Regarding discrimination, the introduction of guaranteed pension increases for post but not pre April 1997 service was imposed on all UK pension plans by legislation. This was not GCP's decision.
- Although GCP may, from time to time, review increases, it was not realistic to expect that "any company would maintain benefits at the same level, ad infinitum, to avoid any sort of intergenerational discrimination."

Summary of Mr S' position

12. Mr S said:-

- GCP had built up a considerable expectation that, from time to time, there would be discretionary pension increases. This expectation existed during and after his period of employment and covered periods when he had to make decisions about his pension.
- GCP had reassured him that discretionary increases had been funded when it asked him to choose between the Plan and a personal pension.
- In 2017, a pensioner had organised a petition asking for discretionary pension increases for members with pre1997 service that suggested pensions in payment could be augmented under the 2018 Rules, but no action had been taken.
- When he started drawing his pension in 1995, its value was close to the national average wage; now it was about two thirds of it and had been seriously eroded. He had suffered severe financial loss.
- He would like GCP to revise its policy and provide a discretionary increase in pensions for pensioners with pre 1997 service, on a regular basis.

Summary of GCP's position

13. GCP reiterated what it had said in its 5 December 2018 and 7 February 2019 responses to Mr S and provided copies of the Trustees' minutes dated March 2018 (**the 2018 Minutes**); the Trustees' minutes dated September 2020 (**the 2020 Minutes**); and a Summary Funding Statement, dated September 2020. Summaries of these are set out in Appendix 4.

Adjudicator's Opinion

14. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by GCP. The Adjudicator's findings are summarised below:-

- Clause 14 provides GCP with the sole decision-making power, when granting discretionary pension increases under the Plan. GCP fulfilled the requirements in Clause 14, when it decided not to grant increases from 2016 onwards and provided adequate reasons for its decision.

- Mr S referred to the 1988 Plan booklet and other documents to explain why he had an expectation of discretionary pension increases. However, the statements that Mr S referred to were made by the Trustees not GCP.
 - The Trustees and GCP had consistently told members of the Plan that non statutory increases for pensions were discretionary, and not guaranteed. There was no evidence that GCP had guaranteed or committed itself to increases and no increases had been granted for over seventeen years. So Mr S had not shown that he had an expectation of receiving discretionary increases or that GCP or the Trustees had previously promised these.
 - Regarding discrimination, the different treatment for members with pre and post April 1997 service resulted from a legal requirement and not a decision by GCP.
 - Augmenting pensions was a discretionary power and GCP could choose not to use it to award pension increases if it did not deem it appropriate to do so.
15. Mr S did not accept the Adjudicator's Opinion and in response made the following submissions:-
- GCP had not disclosed the actuarial reports to support its claim that it had decided not to award discretionary grants for financial reasons.
 - The Trustees provided no evidence that the Plan could not afford to provide increases for pre 1997 service. On the contrary, the financial information provided in the Newsletters indicated that the Plan was in good financial health.
 - It may have been the Trustees who stated that the Plan could not afford discretionary pension increases, but there was no doubt the information was provided by GCP.
 - GCP used the legislation as a pretext in order to avoid paying discretionary pension increases for pensioners with pre1997 service and had not provided financial information to support its decision not to do so. The requirement to pay increases to one group did not imply or require that other groups should be treated less well.
 - He also questioned the validity of GCP using its "discretion" to disadvantage one group of pensioners who had been encouraged to stay in the Plan in 1988, with the expectation of regular pension increases.
16. As Mr S did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. I agree with the Adjudicator's Opinion and note the additional points raised by Mr S which do not change the outcome.

Ombudsman's decision

17. Mr S' complaint is that GCP discriminated against him by failing to award discretionary pension increases, from March 2016 onwards, that he had expected to receive.
18. GCP claimed that it had followed the Deed and Rules and statutory requirements and had decided not to award discretionary pension increases from 1999 onwards, for financial reasons.
19. The Deed and Rules apply to Mr S' pension as he left the Plan in December 1994. The relevant provisions on pension increases are set out in Rule 15 (Guaranteed Minimum Pensions) and Clause 14 (Discretionary increases to Pensions and General Augmentation of Benefits).
20. Rule 15 provides that any pension that Mr S earned from 6 April 1988 to January 1995, that includes GMP, must be increased in line with statutory requirements. I consider that there is no requirement, under the Deed and Rules, for the Plan to increase any part of Mr S' pension in excess of GMP, or any part of the pension he earned from August 1966 to 5 April 1988. There is also no requirement under the Pensions Act 1995, for GCP to provide additional statutory increases for pensions earned before 6 April 1997.
21. Clause 14 gives GCP sole discretion to award discretionary increases. It provides that GCP must review pensions in payment from time to time, having regard to the rise in the Index and the financial state of the Plan. It may then direct the Trustees to increase pensions at its discretion, on the advice of the Actuary.
22. I note that the pension benefits that Mr S earned from 1966 to 1988, were increased at GCP's discretion, in accordance with Clause 14, from January 1987 to January 1999. Since then, the three yearly review process consistently failed to agree an increase, and Mr S is dissatisfied with this.
23. I have considered if the procedure that GCP followed in exercising its discretion was reasonable. The main issue is whether there was a breach of the duty of good faith, that resulted in GCP acting in a way that no reasonable employer would have acted.
24. There are some well-established principles which a decision maker is expected to follow in exercising its discretion. Briefly, it must take into account all relevant matters and no irrelevant ones. It must not make a decision that is perverse and which no reasonable decisionmaker, properly directing itself, could arrive at in the circumstances. GCP, as employer, was entitled to act in its own interests, provided it had regard to the reasonable expectations of the members of the Plan.
25. Mr S submitted that the 2018 and 2020 Minutes did not provide reasons for GCP's decision not to award discretionary increases. Neither did GCP provide copies of the Actuary's advice nor any financial evidence to show the negative financial impact that an increase would have on the funding position of the Plan. I accept that the 2020

Newsletter showed that the Plan was in good financial health, being fully funded in March 2018, with a surplus of £7.9m, in March 2019, with a surplus of £4.5 m and in March 2020, with a surplus of £6.4m.

26. However, despite the evidence of a surplus in the Plan, I consider that GCP did not act unreasonably in not awarding discretionary increases on Mr S' pension. GCP provided specific reasons for its decision not to award discretionary increases, such as explaining that funding nine hundred pensioners with pre 1997 service was prohibitive and threatened the security of the Plan.
27. It also provided financial evidence to show that the past surplus had been used in a bulk buy-in exercise in 2015 and 2016, to insure pension benefits and thus protect the Plan. The 2020 Funding Statement also showed that, at the 2016 valuation, the estimated solvency funding level was 94%, with an estimated shortfall of £11m. It also confirmed that the Plan closed to future accrual, on 31 December 2019.
28. In addition, GCP consistently informed members of the Plan that increases were discretionary. The Trustees had also explained, in the 1988 Plan booklet and other documents, that non statutory increases for pensions were discretionary, and not guaranteed. Discretionary increases had not been granted for over seventeen years, so I do not find that Mr S has shown that he had an expectation of receiving any discretionary pension increases from March 2016 onwards, on his pension.
29. Regarding Mr S' complaint about discrimination, I find the different treatment for members with pre and post 6 April 1997 service resulted from a legal requirement in the Pensions Act 1995. It was not a decision made by GCP. I agree with GCP's statement that it did not intentionally disadvantage members with pre 1997 service.
30. I find that GCP reached a decision in a proper manner and arrived at a decision which was not perverse. I consider that its decision not to award discretionary increases for post 1997 service on financial grounds was not unreasonable.
31. I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman

12 January 2021

Appendix 1

Extracts from the Supplemental Definitive Deed and Rules dated 24 February 1988.

Second Schedule.

DISCRETIONARY INCREASES TO PENSIONS AND GENERAL AUGMENTATION OF BENEFITS.

Clause 14.

- (a) Any pension or annuity currently payable out of the Plan shall be reviewed from time to time by the Principal Employer having regard to the rise in the Index and the financial state of the Fund and may from time to time be increased by such amount and at such time the Principal Employer at its discretion acting on the advice of the Actuary shall decide. Provided that no increase shall be granted that will prejudice Revenue Approval.
- (b) The Trustees at the request of any Participating Company and the payment by such company of such additional contributions as the Trustees (with the advice of the Actuary) may consider appropriate
 - (i) may augment any of the Relevant Benefits of any Member or other person entitled to benefits under the Plan.
 - (i) may pay out of the Plan any Relevant Benefits for which the Participating Company has a liability.

Provided that Revenue Approval would not thereby be prejudiced.

"Index" means the Government Index of Retail Prices or such other index considered suitable by the Trustees and approved for use in connection with the Plan by the Commissioners of Inland Revenue.

GUARANTEED MINIMUM PENSION

Rule 15

- (a) The provisions hereafter appearing in this Rule shall apply if any employment becomes Contracted-out Employment by reference to the Plan and they shall then override any other provisions of the Trust Deed and Rules which are inconsistent with them except the provisions of Clause 13 (a).
- (b) If an Earner has a Guaranteed Minimum in relation to the pension for him under the Plan in accordance with Section 35 of the Pensions Act.

(i) the weekly rate of the Earner's pension from Pensionable Age shall not be less than the Guaranteed Minimum and

(ii) if the Earner is a man and dies at any time leaving a widow,

the weekly rate of the pension provided for her under the Plan shall not be less than half that Earner's Guaranteed Minimum.

(iii) if the Earner is a woman and dies on or after 6 April 1989 leaving a widower, the weekly rate of the pension provided for him under the Plan shall be not less than half of that part of the Earner's Guaranteed Minimum which is attributable to earnings for the tax year 1988/89 and subsequent tax years.

- (c) The Guaranteed Minimum Pensions referred to in sub-rule (b) shall, insofar as they are attributable to earnings in the tax years from (and including) 1988/89, be increased in accordance with the requirements of section 37A of the Social Security Pensions Act 1975 and to the extent of any orders made thereunder.

"Guaranteed Minimum" and "Guaranteed Minimum Pension" shall have the meaning ascribed to them by the Social Security Pensions Act 1975.

NOTE

Guaranteed Minimum Pension (GMP)

GMP is the minimum pension entitlement for members who were contracted out of the State Earnings Related Pension Schemes (SERPS) prior to April 1997.

Final salary schemes (COSRs) are required to provide increases on any GMP earned after 6 April 1988 in line with the annual measure of UK inflation each September, with a maximum of 3%. There is no requirement on COSRs to provide increases on GMP earned before 6 April 1988.

However, a COSR does not have to increase any part of a pension built up from savings made before 6 April 1997, except for the GMP.

GMP must currently be increased each year as follows:

- GMP built up before 6 April 1988 is not subject to a statutory requirement to be increased*
- GMP built up from 6 April 1988 to 5 April 1997 is increased by the scheme up to a cap of 3%

Appendix 2

The GCP UK Pension Plan.

Definitive Trust Deed and Rules dated 21 March 2018.

Summary of Rule 7 that sets out the provisions for increases to pensions in payment.

Rules 7.2.1.3 and 7.2.1.4 provide that:

- Pensions attributable to service after 5 April 1997 should be increased broadly in line with the cost of living, following statutory requirements.
- Guaranteed Minimum Pensions (**GMPs**) relative to service from 6 April 1988 to 6 April 1997 should be increased by the amount required by law.
- Pensions attributable to service before 6 April 1988 need only be increased by law if they include GMP.

Rule 7.2.3 states that:

“The Principal Employer must from time to time review all pensions in payment under the Plan, and having regard to the finances of the Plan, any increase in the Index, and the advice of the Actuary, may direct the Trustees to give an increase in respect of Pensionable Service before 6 April 1997, or a greater increase in respect of Pensionable Service after 5 April 1997, or both.”

Note: Each year, the Plan must increase pensions (above GMP) as follows:

- any pension built up after 6 April 1997 is increased in line with the consumer prices index (CPI) or 5%, whichever is lower.
- any pension built up after 6 April 2005 is increased in line with the consumer prices index (CPI) or 2.5%, whichever is lower.

The Plan does not have to increase any part of the income built up from savings made before 6 April 1997, except for the GMP.

Extracts from the Rules

Rule 11.1 Augmenting the benefits

Subject to Rule 11.2 and to the consent of the Principal Employer, the Trustees may provide additional or new benefits which when payable would qualify as Authorised Member Payments for any Member, a dependant of a Member or other person entitled or prospectively entitled to receive benefits under the Plan.

Subject to Rule 11.2, if the Principal Employer requests, the Trustees must provide additional or new benefits which when payable would qualify as Authorised Member

Payment for any Member, dependant of a Member or other person entitled or prospectively entitled to receive benefits from the Plan.

Rule 11.2 Contributions by the Employer

Before the Trustees provide any additional or increased benefits in accordance with Rule 11.1, the relevant Employer must first agree to pay to the Trustees such sums (if any) as the Trustees consider, on Actuarial Advice, to be appropriate.

Applicability of the Deed and Rules

Clause 2

The Definitive Trust Deed and Rules shall replace all documents governing the Plan. The Rules shall apply with effect from the date of this Deed or from such other dates as are either specified in the Rules or required by law. However, they shall not change the benefits payable in respect of Members whose Pensionable Service ceased before that date unless otherwise specified in the Rules.

Appendix 3

Extracts from the 1988 Grace UK Pension Plan booklet.

...no provision for regular and automatic increases to pensions...if the cost of living has risen substantially...then additional increases to pensions in the course of payment may be granted. The Companies' payments to the Plan include a contribution for this purpose...

The Company may review your pension and make increases from time to time to help offset the effects of inflation, provided sufficient resources are available.

1996 Option to change

Discretionary increases on pension in excess of Guaranteed Minimum Pension paid from the Grace UK Pension Plan have historically been granted.

Extracts from 1997 letter to pensioners from the Trustees

Limited Price Indexation

The Trustees and the Pensioner Representatives have received a number of letters following the article on Limited Price Indexation (LPI) published in this year's Trustees' Report.

Most of the letters criticised the Company for restricting LPI to pensions earned after 5 April 1997. In the Trustee's Report we did not make the connection between the requirements of the 1995 Pension Act and LPI clear enough.

We therefore wish to stress that LPI has been introduced by the Pensions Act and is not a Company decision. Under this legislation, only pensions earned by service completed after 5 April 1997 will receive these LPI increases, which are increases in line with the increase in Retail Price Index, subject to a maximum of 5% a year.

It is appreciated that the discretionary increases to pensions awarded by W R Grace is the subject of much comment from pensioners particularly when inflation is low. However, discretionary increases of approximately 75% of the increase in Retail Price Index have been awarded at intervals over the years, including years when the year on year increase in RPI was much higher than 5%.

Extracts from 4 May 1999 communication to pensioners

Increases are at the discretion of the Company.

In the past Grace has usually increased pensions by 75% of the inflation rate, when inflation is about 10% since the last pension increases. The discretionary increase is related to a proportion of the rise in the Retail Prices Index (RPI) since the date of the last discretionary increase provided by the Plan.

1999 Pension News

Increases are at the Company's discretion. However, Grace's practice has been to implement an increase whenever the Retail Price Index goes up by about 10% since the date of the last increase.

Pensions can only be reviewed according to the Trust Deed and Rules. In the Grace Plan provision is made for periodic reviews as decided by the Company and not according to a fixed date. The Company's practice is to provide an increase whenever the rise in the Retail Price Index reaches a certain level.

Grace UK Pension Plan Booklet 2000

If you have Pensionable Service before 6 April 1997 the Company may review that part of your pension and make increases from time to time, to help offset the effects of inflation. These increases are discretionary.

2017 Grace UK Pension Plan Booklet Leaflet for employees who joined the Plan before 1st October 2003.

If you have Pensionable Service before 6th April 1997, the Company may review that part of your pension and make increases from time to time, to help offset the effects of inflation. These increases are discretionary. Discretionary increases have been provided from time to time in respect of pre 6th April 1997 Pensionable Service. Decisions on discretionary increases are made by the Company.

If you have Pensionable Service before 6th April 1997, the Company may review that part of your pension and make increases from time to time, to help offset the effects of inflation. These increases are discretionary.

At the time of writing this booklet, the last discretionary increase was in January 1999 and the Company has no plans for discretionary increases in the foreseeable future, although it has a process to review every three years.

2020 Letter to pensioners.

The increase awarded to pension in excess of GMP up to 5 April 1997 is discretionary. For the April 2020 increase, the Trustee has confirmed that there will be no discretionary increase awarded.

Appendix 4

- 1 Trustees' minutes dated March 2018 (**the 2018 Minutes**) state:

"The company has confirmed that it has reviewed pensions in payment. It has been decided not to award discretionary increases on pensions earned for service before 6 April 1997. This was due to the significant negative financial impact that such an increase would have on the funding position of the Plan, both now and in the future."

- 2 Trustees' minutes dated September 2020 (**the 2020 Minutes**) state:

"Following a review by the Company after the 2019 valuation, as required under the Trust Deed and Rules, the Company has decided not to consent to any discretionary pension increases.

In response to a petition for augmentation the Company was not prepared to consider any augmenting of pensions for the group of pensioners who are worst affected by these decisions or to share any details of the costs of funding increases."

- 3 A Summary Funding Statement, dated September 2020 shows:

- In March 2018, a surplus of £ 7.9m. and a funding level of 104%.
- In March 2019, a surplus of £ 4.5 m. and a funding level of 102%. This included reserve for expenses and costs of GMP equalisation of £4.6m.
- On 31 March 2020, a surplus of £6,4m. and a funding level of 102%.
- At the 2016 valuation, the estimated solvency funding level was 94%, with an estimated shortfall of £11 m. GCP's sponsoring company has provided a guarantee if it gets into financial difficulties and cannot meet its financial obligations to the Plan of £10m or 12% of the buyout shortfall, if higher.
- On 31 December 2019, the Plan closed to future accrual.