

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

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| Applicant | Mr Anthony Hunt |
| Scheme | Hanson Industrial Pension Scheme (the Scheme) |
| Respondent(s) | HIPS Trustees Limited (the Trustee) |

Subject

Mr Hunt's complaint is that his pension is lower than it should be because it was wrongly calculated using rules that post-date his employment. Mr Hunt says that since he left employment, the Trustee changed the way pensions were revalued in deferment. He was never informed of the change and he does not believe the Trustee had authority to make it. In his opinion there was a "detrimental modification", under section 67 of the Pensions Act 1995.

Mr Hunt believes that his pension should be re-calculated in-line with a 1993 Pensions Handbook (**the Handbook**), which said that, whilst in deferment, his pension would receive increases of 5% per annum compound.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against the Trustee because:

- Mr Hunt's pension was properly calculated using the rules in force at the time he retired;
- There was no detrimental modification of the rules from the interim trust deed to the definitive trust deed – the interim trust deed did not say how revaluation was to be carried out.
- the Handbook did not say that deferred pensions would receive set increases of 5%, and would not, in any case, override the Scheme rules.

DETAILED DETERMINATION

Scheme Rules / Scheme Handbook / History of the Scheme

Civil and Marine Slag Cement Limited Interim Trust Deed dated 22 April 1992

6. The full provisions of the rules of the Scheme will be set out in a Definitive Trust Deed which the Principal Employer and the Trustees hereby undertake to execute within twenty four months of the date hereof. This Deed shall be in such a form as to comply with the following requirements

...

- (3) The Scheme shall be operated in conformity with the requirements contained in section 63 of the Social Security Act 1973 and Schedule 16 thereto and any regulations made thereunder relating to the preservation of benefit rights for Members who leave service before normal retirement date or any statutory amendment or re-enactment thereof for the time being in force

Definitive Trust Deed for the C & M Slag Cement 1992 Retirement Benefit Scheme dated 17 September 1996

8. Early Leavers

...

- 8.3 The pension referred to in sub-Rule 8.2 above shall be increased in the period from the date of termination of Pensionable Service to Normal Retirement Date by 4% compound or such other annual amount as the Trustees, acting on the advice of the Actuary shall, in their absolute discretion determine and as shall not jeopardise Approval.

The C & M Slag Cement Limited Retirement Benefit Scheme, Scheme Handbook (1993)

I. Introduction

This booklet summarises the benefits provided by the C & M Slag Cement Ltd Retirement Benefit Scheme, full details of which are contained in the appropriate Trust documents. These documents may be viewed, at any reasonable time, on request to the Personnel Department. In the event of any dispute, the formal documents override this booklet.

...

8. Leaving the Company

...

Two or more years pensionable service.

You would be entitled to a deferred pension, payable at normal retirement date... The part of the deferred benefit, calculated as above and earned since 1.1.1985 will be revalued through to retirement age. Currently the revaluation rate is 5% p.a. compound.

1. Mr Hunt was employed by Civil and Marine until January 1996. He was a member of the C&M Slag Cement 1992 Retirement Benefit Scheme, which was established under an interim deed of 22 April 1992.
2. Under clause 6 of the interim deed the Trustee were to execute a definitive trust deed within 24 months of 22 April 1992 but this was not achieved. The definitive trust deed was not executed until 17 September 1996.
3. On 24 November 1997 a Deed of Novation and Ratification and Change of Name was issued, the effect of which was to appoint a new principal employer from 17 September 1996 and change the name of the scheme to the North East Slag Cement Pension Plan (**NESCPP**).
4. NESCPP was closed to new members in 2005 having, by late 2004, accumulated a deficit of over six million pounds.
5. NESCPP merged into the HIPS on 1 October 2006. In relation to deferred members, the merger agreement of 21 August 2006 said:

“4.1.2 For and in respect of NESCPP Deferred Members, benefits shall be payable at the same times, of the same amounts, and subject to the same guaranteed terms and conditions as described in the provisions of the NESCPP which applied to determine the benefits prospectively payable to and in respect of them immediately before the date of this Deed.”

Material Facts

6. On 23 April 1996 NESCPP's administrator wrote to Mr Hunt about his deferred benefits. The letter said that Mr Hunt's paid up pension was worth £5,512.50 per annum, and that the pension would be subject to increases up until normal retirement age. At retirement, it was estimated that Mr Hunt's pension would be worth approximately £10,000 per annum.
7. On 18 March 1998, the NESCPP Trustee wrote to in-service members (which did not include Mr Hunt at this stage) enclosing individual benefit statements, the 1997 Trustee's report and an updated scheme booklet. The cover letter stated:

“The pension payable on leaving the Company’s employment will be revalued in the period between the date of leaving and age 65 in line with the cost-of-living, subject to a maximum of 5% p.a.”

8. On or about 5 June 1998 and 2 March 2001 Mr Hunt received entitlement statements from NESCPP’s administrator. The statements said that prior to payment, Mr Hunt’s pension at time of leaving (£5,512.50 per annum) would receive statutory increases up to 5% per annum. And around 5 April 2004 Mr Hunt received a similar statement, which said that before retirement, his pension would receive increases equivalent to the lower of 5% per annum compound or the increase in RPI.
9. The NESCPP Trustee held a meeting on 27 April 2006. Of increases in deferment the Trustee said:

“... explained that under the Plan’s Rules allowance was made for the revaluation of early leaver benefits for the period between leaving and retirement at 4% or such other rate as might be agreed but the Trustees after taking the advice of the Actuary. He explained that the Trustees had historically revalued early leaver benefits in accordance with statutory revaluation; i.e. in line with RPI subject to a maximum of 5% p.a. As this practise had not been previously minuted, he asked the Trustees to ratify both this practice and its continuation which they did after taking his advice.”
10. On 22 May 2009, following a request from Mr Hunt, Hanson Pension Office (HIPS internal administration office) provided benefit estimates at age 63, 64 and 65 and a Cash Equivalent Transfer Value (**CETV**). The estimates at age 65 said that Mr Hunt would be entitled to gross pension of £8,400, or a reduced pension of £5,700 and a lump sum of £38,000. The CETV was said to be £131,974.
11. On 4 June 2010 Hanson Pension Office wrote to Mr Hunt quoting a CETV of £139,852.
12. On 10 June 2010 Mr Hunt obtained Open Market Option quotes from several providers, based on the transfer value of £139,852. Mr Hunt has not retained copies of the various quotes but he says that the figures were as follows:

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| Saga | £7,551.60 |
|------|-----------|

| | |
|-----------------|--|
| Aviva | £5,693.88 (after taking 25% tax free cash) |
| Legal & General | £7,559.00 |
| Canada Life | £7,277.76 or £5,451.60 (after taking 25% tax free cash) |

13. On 31 May 2011 Hanson Pension Office wrote to Mr Hunt to confirm that as at his normal retirement date (age 65), he would be entitled to a gross pension of £8,159 or a reduced pension of £5,148 and a lump sum of £34,323.
14. Mr Hunt's pension was eventually put into payment backdated to 2 September 2011, at the rate specified within the letter of 31 May 2011. However, before this occurred Mr Hunt got in touch with the Trustee to complain that there were differences between the information supplied on 31 May 2011 and previous quotations.
15. On 13 June 2011 Mr Hunt wrote a letter to the Trustee, in which he stated:

“As mine is a final salary pension there could be no possibility of the pension ‘pot’ reducing. The scheme’s Statement of Entitlement states annual pension increases before retirement by RPI to a maximum of 5%.”
16. Over the course of several letters the Trustee explained that the benefit estimate of 22 May 2009 and the CETV quotations provided on 22 May 2009 and 4 June 2010 were incorrect (the transfer value as at 4 June 2010 should have been £99,538).
17. The benefit estimate was incorrect because:

“...the rates used for the calculation of the amount of pension you would give up in exchange for a lump sum wrongly assumed that your pension would increase in payment. In fact, this is not the case because your pension relates to service completed prior to April 1997.”
18. The CETVs were said to have been incorrect because they had been calculated on the basis that Mr Hunt's pension increased by 5% fixed in deferment, whereas Mr Hunt's pension should have increased by price inflation to a maximum of 5%.
19. Mr Hunt was not satisfied with the explanations given and so he continued to correspond with the Trustee. Much of the correspondence in 2011 / 2012 dealt with Mr Hunt's initial complaint, which was in relation to a possible financial loss arising from the incorrect pension quotations he was supplied with. Mr Hunt said

that had he been supplied with the correct information, he would have transferred his pension to another provider, with the view of securing a better annuity. However, Mr Hunt no longer pursues his complaint in its original format. Mr Hunt's complaint (as described above in the complaint summary) is now centred on his disagreement about the way in which his pension was revalued in deferment.

Summary of Mr Hunt's position

20. The Handbook provided for increases for pensions in deferment at a rate of 5% per annum compound. This was subsequently changed to 4% in the Definitive Trust Deed of September 1996, which has caused some confusion.
21. Neither the Handbook nor the Trust Deed was written with the intention of creating a link to RPI.
22. In 1996 the Scheme's administrators quoted that his pension would be worth £10,000 per annum, at retirement. Yet, when he retired in 2011, he was awarded a pension of £8,159 per annum.
23. As a result of the change in the way the Trustee revalued deferred pensions his pension has reduced by £1,800 per annum (£9,928-£8,159 assuming 4% fixed rate).
24. Deferred pensions are subsisting rights and the change of the rate of revaluation was a detrimental modification under section 67 of the Pensions Act 1995 (see appendix) as it would, or might, adversely affect subsisting rights of a member.
25. Also in contravention of section 67 of the Pensions Act 1995, he was neither informed of the revaluation change nor asked for his consent; and the change does not meet the requirements of actuarial equivalence. The change to revaluation was also a breach of trust.
26. The Definitive Trust Deed is not relevant to him because it is dated September 1996, some eight months after his employment ended. It does not, in any case, change the basis for revaluation or override the Handbook. Neither does it give the Trustee absolute discretion to change the basis of revaluation of deferred pensions sometime in the future.
27. The 1998 handbook was not made available to him and he did not receive a copy of the Interim Trust Deed until January 2015.

28. He finds it difficult to accept that benefit entitlement was not formally documented in the rules until 1996, taking into consideration that a scheme handbook had been produced and the Scheme had been in operation for some years. Common sense suggests that there must have been rules as a source of reference. Since the Trustee has failed to produce the rules, he cannot accept their assertions that they are entitled to use later rules to calculate his benefits.
29. The Handbook says that “These (Trust) documents may be viewed...on request...In the event of any dispute, the formal documents override this booklet.” If definitive rules were not in place when the Handbook was issued, there were no formal documents in existence to override the Handbook. The contractual position is therefore that the Handbook, taken together with the letter he received when he left employment (Advisory and Brokerage Services letter of April 1996), must be the source of reference in calculating his benefits. The Pension Scheme was a contractual benefit of employment. Due to organisational changes he was offered and accepted, a new contract of employment in 1992.
30. His complaint has not been re-formulated (as the Trustee has suggested). Maladministration concerning revaluation rate only came to light after he complained that his pension was lower than expected. As he did not feel that he received a complete answer to his complaint, and HIPS failed to produce the rules he asked for, he continued with his complaint.
31. He does not consider that the £1,000 compensation offered by the Trustee is adequate.

Summary of the Trustee’s position

32. The pension Mr Hunt is receiving (in excess of Guaranteed Minimum Pension) was increased during the period of deferment in line with price inflation capped at 5% (RPI until January 2011 and CPI thereafter).
33. It is not clear what assumptions the previous administrator used when compiling the letter of 23 April 1996. Nevertheless, such statements are based on predictions of how inflation will change until retirement and, as stated in the letter, the figure is an estimate and not a guaranteed amount.

34. NESCPP rules provide for revaluation of "...4% compound or such other rate as the Trustees, acting on the advice of the Actuary shall, in their absolute discretion determine and as shall not jeopardise Approval."
35. The Handbook said the revaluation rate was "currently" 5% and page 1 of the Handbook stated "in the event of any dispute, the formal documents [the rules] override this booklet."
36. The updated handbook supplied to members in 1998 said that pensions would be revalued "...with the cost of living subject to a maximum of 5% per annum."
37. As with the handbooks, the statements sent to Mr Hunt in 1998 and 2004 do not support the assertion that Mr Hunt's pension should receive increases of 5% per annum compound in deferment.
38. Part 4 of the Pension Schemes Act 1993 requires pensions that relate to pensionable service after 1 January 1985 to be increased by the value of deferment by at least the "appropriate revaluation percentage". The Civil and Marine Scheme would not have complied with the statutory minimum revaluation requirements by applying fixed 4% per annum increases. Therefore, the Trustee reviewed the method of revaluation - this is confirmed by minutes of a meeting of the Trustee dated 24 April 2006.
39. No substantive change to the rate of revaluation occurred. The decision taken at the April 2006 meeting seems to have confirmed and ratified the practice that had always been followed.
40. There was no detrimental modification to Mr Hunt's rights under section 67 Pensions Act 1995 and, therefore, no need for the former Trustee to obtain members' consent.
41. When the NESCPP was merged into HIPS, Hanson Pension Office received documentation i.e. the minutes of the 24 April 2006 meeting and the letter the former trustee sent to in-service members in March 1998, indicating that the revaluation basis to be used was the statutory basis (RPI capped at 5% at the time).
42. The files are consistent with the legal agreement relating to the merger, which required the provision of guaranteed benefits, with no provision for revaluation in deferment exceeding statutory minimum requirements.

43. The definitive trust deed was not executed until 17 September 1996. This means that prior to this date, the benefits provided under the scheme had not been formally documented in the rules and so, when determining the benefits payable to or in respect of a member who left service before that date, it is necessary to refer to the rules contained in the 1996 deed.
44. Irrespective of the fact that formal rules (detailing the basis for revaluation in deferment) were not in force at the time Mr Hunt left service, Mr Hunt would have been entitled to have his benefits revalued on the statutory basis under the Pensions Schemes Act 1993.
45. Mr Hunt says that he was expecting to receive a pension which increased during deferment by 5% per annum. Yet in his letter of 13 June 2011 he said that “The Scheme’s Statement of Entitlement states annual pension increases before retirement by RPI to a maximum of 5%²”.
46. The Trustee is required by law to pay benefits in accordance with the governing documentation of the Scheme and unfortunately the fact that Mr Hunt was provided with incorrect, overstated estimates does not give Mr Hunt a legal right to receive an increased pension.
47. The Trustee very much regrets the errors which were contained in the estimates provided to Mr Hunt in 2009 and 2010. These errors were caused by human error on the part of Hanson Pension Office, who used incorrect assumptions when providing estimates. They apologise for the distress and inconvenience which Mr Hunt may have suffered as a result. They previously offered £500 to compensate for the maladministration that occurred, however, after careful consideration, the offer of compensation was increased to £1,000.
48. The Trustee has tried to resolve Mr Hunt’s complaint but the nature of Mr Hunt’s complaint has changed during the course of the correspondence.

Conclusions

49. Mr Hunt’s complaint has changed over time. The complaint which was accepted for investigation by the Pensions Ombudsman’s Service relates to the way Mr Hunt’s pension was revalued whilst in deferment. I note that within the various submissions made to the Pensions Ombudsman’s Service, there are references to the earlier complaint but in line with Mr Hunt’s application, my conclusions solely deal with his complaint concerning the proper revaluation rate.

50. The 1992 interim trust deed did not set out the full details of how members' benefits should be administered. However, clause 6 set out the Trustee's aims / requirements in relation to the eventual definitive trust deed, and one of those requirements listed mentioned deferred members. Clause 6(3) stated the intention that, under the scheme, the rights of deferred members should be in line with provisions provided for in Schedule 16 of Social Security Act 1973 or any subsequent statutory amendment or re-enactment in force at the time the member left employment.
51. Despite the interim trust deed creating a link between deferred pensions and statutory provisions, when the definitive trust deed was created, there was no mention of legislation. Instead rule 8.3 said that increases in deferment would be 4% compound or any other rate at the Trustee's discretion.
52. The Pensions Act 1993 was already in place by this point, which entitled Mr Hunt's pension to revaluation of RPI up to 5%. However, I note that the way rule 8.3 is worded allows the Trustee broad powers to vary the rate of revaluation. They may set a revaluation rate at a level above that of the statutory minimum, should they choose to do so.
53. Mr Hunt says that the definitive trust deed and rules of 1996 do not apply to him because they were made after his employment had ended. But, in terms of the calculation of his pension, is it the rules in force at retirement that apply, not the rules as they were when employment ceased.
54. I do not agree with Mr Hunt's interpretation of the information given in the Handbook. The Handbook did not give an undertaking that the deferred pensions would receive increases of 5% compound. The Handbook merely said that pensions would be revalued up until retirement age and that the current rate was 5%.
55. Even had the Handbook given an undertaking as to a specific rate, it would not override the scheme rules. I appreciate that the definitive rules were not in place at the time but their absence does not mean that the Handbook becomes the default legal document. An interim trust deed existed, which mentioned an intended link between deferred members' rights and statutory legislation (Mr Hunt's pension has been revalued in accordance with the statutory minimum as

of the date of his retirement); and there was a clear undertaking that definitive rules would be produced in due course.

56. Neither the Handbook nor the letter (April 1996) Mr Hunt received when he left employment form the basis of a contract - for example there was no offer or acceptance. The Handbook and letter were produced for information only purposes and did not provide any guarantees about the level of benefits Mr Hunt would receive. Furthermore, Mr Hunt's right to a pension may have been mentioned within his 1992 contract of employment but that does not mean that the Handbook and the letter are themselves contractual.
57. In addition, Mr Hunt received several other items of correspondence, which should have led him to the conclusion that the revaluation rate was not fixed at 5%. The benefit statements of 1998, 2001 and 2004 say either that increases would be up to 5%, or the lower of 5% and RPI. I appreciate that Mr Hunt is not a pensions expert but in this respect, the language used is clear enough for a layman to understand.
58. Because of the difference in the wording between the 1993 Handbook and the subsequent 1996 rules, it seems that Mr Hunt assumed that rule 8.3 of the 1996 rules represented a change from the earlier rules, which he had not had sight of. However, now the Trustee has supplied a copy of the interim trust deed it is apparent that this is not the case. The interim trust deed did not set out precisely how deferred pensions should be treated and so there was no change.
59. Mr Hunt believes that a set of rules (informal or otherwise) must have existed before the 1996 Definitive Trust Deed, because otherwise the Handbook could not have been produced. However, the trust deed and rules contain a list of all of the scheme documents and I have no reason to believe that relevant information has been withheld or misplaced.
60. Section 67 of the Pensions Act 1995 does not apply. There was no change to the rules and even if there had been, since the Trustee administered Mr Hunt's pension in line with the statutory legislation, their actions could not be termed a "detrimental modification." And in any case, section 67 of the Pensions Act 1995 did not come into force until after the definitive trust deed was drawn up.

61. In conclusion, the Scheme rules allow the Trustee to set the revaluation rate at 4% compound or at any other rate at their discretion, and so they were entitled to apply revaluation in line with the statutory minimum. Furthermore, Mr Hunt's pension has been properly calculated in line with the rules in force at the time of his retirement; and there was no detrimental modification of the rules. Hence, Mr Hunt's complaint is not upheld.

Jane Irvine
Deputy Pensions Ombudsman

30 March 2015

Appendix

Pensions Act 1995

67 The subsisting rights provisions

(1) The subsisting rights provisions apply to any power conferred on any person by an occupational pension scheme to modify the scheme, other than a power conferred by-

(a) a public service pension scheme, or

(b) a prescribed scheme or a scheme of a prescribed description.

(2) Any exercise of such a power to make a regulated modification is voidable in accordance with section 67G unless the following are satisfied in respect of the modification-

(a) in the case of each affected member-

(i) if the modification is a protected modification, the consent requirements (see section 67B),

(ii) if it is not, either the consent requirements or the actuarial equivalence requirements (see section 67C),