

## Ombudsman's Determination

Applicant	Mr E
Scheme	DSSR Group Pension Scheme (the <b>Scheme</b> )
Respondents	Trustees of the DSSR Group Pension Scheme (the <b>Trustees</b> )

## Outcome

1. I do not uphold Mr E's complaint and no further action is required by the Trustees of the DSSR Group Pension Scheme.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr E has complained that the Trustees have reduced his pension going forward because they consider it to have been incorrectly calculated.

## Background information, including submissions from the parties

### Background

4. Mr E worked for DSSR Consulting Engineers Limited (**DSSR**) and was a member of the Scheme. In July 2000, the Scheme was closed for future accrual. Mr E retired in March 2002.
5. On 2 September 2013, the Trustees wrote to Mr E explaining that a recent audit had revealed that his final pensionable earnings, on which his pension had been based, had been incorrectly calculated. The Trustees said that the final pensionable earnings had been calculated by reference to uplifted earnings from previous years, which was not in accordance with the Scheme rules.
6. The Scheme's governing document is the Trust Deed and Rules dated 6 February 1989. "Final Pensionable Earnings" is defined as:  
  
"... the annual average of his Pensionable Earnings over the 3 consecutive complete years (or such shorter period comprising his Pensionable Service) ending on the 6th April immediately preceding or coincident with the date on

which the Member left or retired from Service, died or attained Normal Retirement Date (whichever is earliest)."

7. The Trustees said they had been instructed by DSSR to recalculate members' entitlements to ensure they reflected the definition of Final Pensionable Earnings as set out in the Scheme Rules. Mr E's pension was to be reduced from £13,230.84 per annum to £11,625.84 per annum with effect from 1 October 2013. The Trustees are not seeking to recover any "overpayment" of pension for the period up to October 2013.
8. In subsequent correspondence, the Trustees said it had been practice over many years to increase members' historic earnings in line with the National Average Earnings Index (**NAE Index**) and take an average of the best three consecutive years. They said this had been done in Mr E's case. The Trustees went on to say that no formal rule amendment had been executed to reflect this practice.
9. The 1988 booklet defined Final Pensionable Earnings as:

"your average Pensionable Earnings in the 3 complete years ending on scheme anniversary preceding retirement"
10. The 1995 booklet defined Final Pensionable Earnings as:

"your average Pensionable Earnings in any 3 complete years in the 10 years preceding retirement. [*Your final pensionable earnings will be revalued in line with National Average Earnings in order to ensure the best 3 years average is used. This protects your benefits if, for example, you work less overtime shortly before retirement.*]"
11. Scheme booklets had been published in 1988, 1989, 1992, 1995 and 1998. The change in the definition of Final Pensionable Earnings occurred between the 1989 version and the 1992 version. The 1988, 1989, 1992 and 1998 booklets all stated: "The benefits payable under the Scheme are determined by the Definitive Trust Deed and Rules. This booklet is only a guide.". The 1995 booklet simply stated: "Remember that this booklet is only a guide.".
12. On 14 February 1992, Hymans Robertson & Co (**Hymans**) (then the Scheme actuaries) wrote to the Secretary of the Trustees. The letter was headed "Employees Booklet". Hymans referred to correspondence in 1991 and said: "The matter was "put on ice" last summer". It said it was enclosing an updated version of the booklet "as a catalyst for further discussion". Hymans said the enclosed draft was essentially the existing booklet text with a few minor adjustments. It went on to say:

"A suggested small (no cost) change has been made to the definition of final earnings. Strictly speaking this may cost money but, in fact, only reduces the surplus that would otherwise arise from the members' situation."

13. Hymans said the Trustees might wish to discuss matters further on 18 February 1992. There was a Trustees' meeting on 18 February 1992, which Hymans attended. The minutes of the meeting record:

"Scheme Booklet

The Secretary had arranged for the Actuary to edit the existing booklet to take account of changes since the last publication.

Following the necessary details being provided a booklet identified by "February 1992" printed on the front cover is now in being and should be used for any future new members."

14. In a letter dated 9 June 1992, the Secretary to the Trustees informed Hymans that the draft booklet had been reprinted and was identified by "February 1992" on the front cover. In its response, dated 25 June 1992, Hymans suggested it would be appropriate for the changes contained in the booklet to be formalised with rule amendments.
15. Clause 9 of the 1989 Trust Deed and Rules provides:
- "The Principal Employer shall have the power with the written consent of the Trustees by deed to amend, delete or add to all or any of the trusts and provisions of the Trust Deed or the Rules."
16. On 7 March 1996, Hymans wrote to the Trustees' solicitors at the time, Rowe & Maw, enclosing a copy of a "recently updated" Scheme booklet. It described its letter as "a catalyst for the documentation changes". Amongst other things, Hymans said:
- "A Final Pensionable Earnings platform has been introduced to cover a drop in earnings close to retirement. This change was as a result of the economic recession and an actual drop in some pensionable earnings amongst the DSSR staff."
17. Hymans concluded its letter by saying Rowe & Maw's comprehensive review of the Scheme Rules would be appreciated.
18. The Trustees have stated that there are no records of any change to the definition of Final Pensionable Earnings in the minutes of their meetings or those of DSSR.

**Mr E's position**

19. Mr E's submissions are summarised below:-

- His decision to retire early on reduced benefits was taken on the basis of the information provided by the Trustees. He considered the level of payments to be sufficient to compensate for the projected pension loss incurred by not working through to age 65. His decision was a conscious one to retire early.

He is not saying that he would not have retired early had he been aware of the revised benefit figures.

- At the time he decided to retire early, the reduction to his pension was approximately 28%. The additional reduction takes the overall “hit” to over 40%. This would have been a significant factor affecting his decision to retire early. He considered that, if he retired early at age 62 and lived to age 75, the 13 years of reduced pension equated roughly to the amount which would have accrued if he worked through to age 65.
- The Scheme Rules were not provided for members; whereas the Scheme booklets were handed out to members.
- A contracting-out notice issued in 1997 stated that the benefits provided by the Scheme would be as outlined in the booklet.
- Clause 8.2 of the Scheme Rules provides an indemnity for the Trustees against any claims arising out of an omission on their part. The indemnity is provided by the Employer. In view of this, he questions why the members should “pick up the tab” for the Trustees’ error.
- The Scheme Rules were not amended but there is no evidence to show that the change was being disputed by DSSR at the time.

### **The Trustees’ position**

20. The Trustees’ submissions are summarised below:-

- Administration practice over many years had been to revalue members’ historical pensionable earnings in line with the NAE Index.
- The definition of Final Pensionable Earnings in the 1988 and 1989 Scheme booklets is broadly in line with the Trust Deed and Rules.
- The definition changed in the 1992, 1995 and 1998 Scheme booklets.
- A statement to the effect that the benefits payable under the Scheme are determined by the Trust Deed and Rules was contained in the 1988, 1989, 1992, 1995 and 1998 Scheme booklets.
- The precise details of the NAE Index revaluation are unclear. It is also unclear what was meant by a Final Pensionable Earnings platform or when this was introduced.
- Normally, the Rules of the Scheme would prevail. However, it is arguable that the Scheme Rules should have been amended and, therefore, should either be treated as amended or amended now.

- Alternatively, the power of amendment, contained in clause 10 of the Trust Deed, was exercised to incorporate the more generous definition of Final Pensionable Earnings. Clause 10 provides:

“The Trustees shall have the power to augment any benefit payable under the Scheme or to pay a benefit otherwise than under the Rules. This power shall be exercised only:

- (1) if the Employer pays such contributions (if any) as the Trustees having consulted the Actuary, may require, and
  - (2) at the direction of the Principal Employer or with its consent, and
  - (3) ...”
- The Scheme has, until recently, been funded on the basis of the more generous definition. It could be argued that the first condition in clause 10 has been met.
  - The Principal Employer’s consent could be implied from the change in wording in the Scheme booklet and from the wording of Hymans’ letter, of 7 March 1996, which suggested the position was an agreed one between the Trustees and the Principal Employer. For example, the letter refers to benefit changes having been made, which suggests agreement had been reached.
  - They find themselves in a difficult position with competing claims from the Scheme members and DSSR. They concluded they could only follow the Scheme Rules unless and until they received a clear direction to do otherwise.

### **DSSR’s position**

21. DSSR submits:-

- The Trustees discovered a discrepancy between the Scheme Rules and the way the Scheme had been implemented.
- It took legal advice and was advised that the Trust Deed and Rules should take precedence.
- After discussion with the Trustees, it agreed it would not be practical or economic to seek to recover historical overpayments.

### **Adjudicator’s Opinion**

22. Mr E’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Trustees of the DSSR Group Pension Scheme. The Adjudicator’s findings are summarised briefly below:-

- The Trustees had reduced Mr E's pension payments because they discovered that his final pensionable earnings had not been calculated as provided for in the 1989 Trust Deed and Rules. Mr W's final pensionable earnings had been calculated using the method described in the Scheme booklets published from 1992 onwards. The first question was, therefore, whether the Scheme Rules took precedence over the Scheme booklets.
- The established position was that where there was such a conflict a scheme's trust deed and rules would always take precedence over any other scheme documentation, including an explanatory booklet. The High Court had held that a reasonable reader of a members' booklet would realise that the full terms could only be found in the relevant scheme's formal trust deed and rules<sup>1</sup>.
- The Adjudicator noted also that each version of the Scheme booklet had contained a statement to the effect that the benefits payable under the Scheme were determined by the Trust Deed and Rules. In other words, it had been made clear that the full terms would be found in the Scheme Trust Deed and Rules and, therefore, any statements made in the booklet were not binding on the principal employer or the trustees.
- The Trustee's legal representatives had suggested that the Scheme Rules should be treated as having been amended. The established position<sup>2</sup> was that any amendment to scheme rules must meet the formalities required by the amendment power contained in its formal documentation.
- There had been circumstances where the courts had departed from this position. For example, in a case where the trust deed required all trustees to declare amendments in writing, but only the four out of five trustees had signed a scheme amendment authority. In that case<sup>3</sup>, the High Court had applied the maxim that equity looks on that as done which ought to have been done. The missing signature was held to be an administrative oversight and a formality which happened after the trustees had exercised their discretion for amendments.
- The circumstances of Mr E's complaint differed significantly from those of the above case. In the above case, the trustees had taken steps to formally change the scheme rules. Although the full requirements had not been satisfied, there was documentary evidence that this had been attempted. The trustees had exercised their discretion and shown their intention was to amend the scheme.
- In Mr E's case, the Adjudicator said she had seen no evidence that the Trustees, or DSSR, had taken any formal steps to amend the Scheme Rules

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<sup>1</sup> *ITN v Ward* [1997] Pens L.R. 131

<sup>2</sup> *Besttrustees plc v Stuart* [2001] EWHC 549 (Ch)

<sup>3</sup> *HR Trustees Ltd v Wembley plc (in liquidation) and another* [2011] EWHC 2974 (Ch)

to reflect the definition in the 1992 booklet. The change in the booklet wording appeared to have been put forward by Hymans as a suggestion. It was described as such in its letter of 14 February 1992. The Trustees met on 18 February 1992 and the minutes of that meeting record that the booklet was discussed. However, there was no clear record of the Trustees having discussed, let alone agreed to, the suggested change to the definition of final pensionable earnings. In addition, DSSR was not represented at that meeting. The attendees were there in their capacity as trustees. Subsequent correspondence between Hymans and Rowe & Maw indicated that there had been no attempt to draft or execute a deed as required by Clause 9. The absence of any record of the Trustees agreeing to the amendment or of any participation on the part of DSSR amounts to more than an administrative oversight. In the Adjudicator's view, it was not possible to find that the Scheme Rules had been amended.

- The Trustees' legal representatives had also suggested that Mr E's pension had been augmented under the augmentation power at Clause 10 of the Trust Deed. They had suggested that Clause 10(1) appeared to have been met because the Scheme had been funded on the basis of the amended definition of final pensionable earnings. In other words, DSSR had paid the contributions required to fund the amended definition.
- However, Clause 10(2) required a direction from or the consent of the Principal Employer to an augmentation. There was no evidence that DSSR had given a direction to augment Mr E's pension. The question remained whether it could be taken to have consented to such an augmentation merely by paying contributions determined on the basis of the amended definition. In view of the potential effect which such an augmentation could have on the funding of the Scheme, and thereby the cost to DSSR, the Adjudicator said she would have expected to see more documentary evidence. For example, correspondence from DSSR to the Trustees and to Mr E setting out the terms of such an augmentation. At a minimum, she would have expected to see the augmentation costed for DSSR to consider prior to its giving a direction or consent. The evidence indicated that DSSR did no more than passively accept the contribution based on a definition not contained in the Deed and Rules.
- Furthermore, the wording of Clause 10 indicated it was intended to allow the Trustees to consider individual cases where the circumstances suggested an increase in benefits was desirable and appropriate. The Trustees' legal representatives had suggested this clause could be used to increase benefits for every member of the Scheme. This would involve amending a fundamental provision set out in the Trust Deed; namely, the definition of final pensionable earnings on which the calculation of benefits is based. Using an augmentation power in these circumstances would stretch its scope to such an extent that its nature would be changed entirely. This might just be contemplated if the

Scheme Trust Deed and Rules had not contained an amendment power but that was not the case.

- In the Adjudicator's view, the evidence did not support a finding that Mr E's pension was augmented under Clause 10.
- It remained to consider whether there was any other reason why the Trustees should not reduce Mr E's pension. In certain circumstances, the Trustees might be prevented from reducing Mr E's pension even though it had not been calculated in accordance with the Scheme Rules. This would be if he could show that the Trustees were estopped from reducing his pension. The Adjudicator considered whether estoppel by representation could be established. To do so, the courts had said the following requirements must be satisfied:-
  - There was a clear representation or promise made by the defendant on which it was reasonably foreseeable that the claimant would act;
  - The claimant took some action which was reasonably taken in reliance on the representation or promise; and
  - The claimant is able to show that he will suffer detriment if the defendant is not held to the representation or promise.
- All of the above elements must be present. In addition, the courts had said that it must be considered unconscionable for the defendant to be allowed to go back on the promise. This was a high benchmark to meet. In view of the fact that, at all relevant times, it had been the stated position that any benefits paid were subject to the Scheme's Trust Deed and Rules, in the Adjudicator's view, the required circumstances for an estoppel were not made out.
- Mr E had suggested he would not have retired when he did if he had been given the correct figures. At the date of his retirement, Mr E had been told his annual pension was £12,083.29. The correct amount was £10,418.28; a difference of £1,665.01 or 14%. The Adjudicator accepted that this difference was of a magnitude which might have resulted in Mr E coming to different decisions made around the time of his retirement. However, this did not affect the Trustees' decision to reduce his pension going forward. They must pay the pension provided for under the Scheme Rules.
- The Adjudicator then considered whether Mr E might have a claim for compensation on the grounds that he was provided with incorrect information. She noted that the Trustees had not asked Mr E to repay any of the pension he was overpaid for the period March 2002 to October 2013. This amounted to something in the region of £18,315; based upon the difference in the annual pension at the date of Mr E's retirement and not taking account of subsequent



increases. In the Adjudicator's view, there were unlikely to be grounds for Mr E to receive further compensation.

23. Mr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr E provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr E for completeness.

### **Ombudsman's decision**

24. Mr E accepts that the Scheme Rules were not amended to provide for the revised definition of Final Pensionable Earnings. The evidence supports such a finding. It appears that the revised definition was put forward by Hymans in a draft booklet but the necessary amendment to the Scheme Rules was not agreed or implemented. The Trustees have, therefore, paid benefits to Mr E which are not in accordance with the Scheme Rules.
25. I note Mr E's reference to the Contracting-out Notice issued in 1997. This did state that the benefits provided by the Scheme would be as outlined in the Scheme booklet. However, I do not find that this is sufficient for the booklet to override the Scheme Rules. The Scheme booklets themselves stated that the benefits would be determined by the Trust Deed and Rules.
26. I have given some considerable thought to the question of estoppel. The term 'estoppel' can refer to any of a number of discrete legal doctrines which prevent (estop) parties from departing from statements or promises which they have previously made to another party. Central to all estoppels is the aim of preventing unconscionable conduct and the principle that "the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations"<sup>4</sup>.
27. Where the circumstances relate to a scheme's documentation, as in this case, the Courts have been reluctant to find estoppel. It is recognised that there are legal difficulties in finding that future trustees are estopped or that the membership as a whole are. It is also questionable whether it would be appropriate to find an estoppel which benefitted some members to the detriment of others. I have come to the conclusion that it is not possible to find that the Scheme Trustees are estopped from saying that the definition of final pensionable salary is as set out in the Scheme Rules.
28. Principally, this is because there was no clear unequivocal statement to the effect that the definition had been amended in the Scheme Rules. The only general statement as to the applicable definition was contained in the Scheme booklets and these contained a caveat to the effect that the Scheme Rules would prevail. This is now

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<sup>4</sup> *Grundt v Great Boulder Proprietary Gold Mines Ltd* [1938] 59 CLR 641 at 674)

generally accepted to be fatal to a so-called “booklet estoppel” claim for benefits outside the terms of the trust deed and rules.

29. Also, for the same reason I do not find that the Contracting-out Notice is sufficient to estop the Trustees from reducing Mr E’s pension in the future.
30. I have also considered whether Mr E has an individual case for estoppel. As my adjudicator indicated, one of the requirements for finding that the Trustees are estopped from reducing Mr E’s pension would be for him to show that he relied to his detriment on a representation or agreed assumption.
31. Mr E has explained that he took a conscious decision to retire early on the basis of a 28% reduction in his benefits. He considered that 13 years at the reduced rate of pension was roughly equivalent to the additional amount he would otherwise accrue by staying to age 65. He has said that the additional reduction takes the pension “hit” to over 40%. However, had Mr E been given the correct information in the first instance, he would have been quoted an annual deferred pension of £15,695.15; instead of £18,866.02. The reduced pension (before taking a lump sum) would have been £14,738.64; instead of £16,403.75. Assuming Mr E opted to take the same amount of lump sum, his residual pension would have been £10,418.28 (34% reduction); instead of £12,083.29 (36% reduction). Since Mr E based his decision to retire early on his assessment of the pension “hit”, it seems likely that he would have come to the same decision on the basis of the revised figures. He could, of course, have elected to take less as a lump sum and received the same actual amount of annual pension. What he would not have factored into his decision is the higher starting pension figure because he would not have been aware of this.
32. Therefore, I do not find that it is possible to say that Mr E acted in reliance on the incorrect benefit figures. It is more likely than not that he would have retired at the same time had he been given the correct information at the outset.
33. Mr E has referred me to the indemnity provided in Clause 8.2. However, this would not protect the Trustees if they knowingly continued to pay Mr E, or any other member, the incorrect benefits. It cannot be used as a mechanism to, in effect, amend the Scheme Rules.
34. Mr E argues that the members should not be expected to “pick up the tab” for the Trustees’ error. I do not find that this is an entirely fair description of the situation. Mr E has received more than he was strictly entitled to by way of pension for the period March 2002 to October 2013. Had the error not occurred, Mr E would have been paid an annual pension of £10,418.28 in March 2002. Instead, he has received approximately £18,315 more than his entitlement over the subsequent years to October 2013. The Trustees are not seeking to recover this. The pension Mr E will receive going forward is the pension he should have been receiving all along. Rather than picking up the tab for the Trustees’ error, Mr E has, to a certain extent, benefitted from it. I do, however, appreciate that he does not see it this way.

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35. Therefore, I do not uphold Mr E's complaint.

**Anthony Arter**

Pensions Ombudsman

5 June 2018