

Ombudsman's Determination

Applicant	Mrs Susan Crawford
Scheme	Marks and Spencer Pension Scheme (the Scheme)
Respondent(s)	Marks & Spencer Pension Trust Ltd (the Trustee)

Complaint summary

Mrs Crawford has complained that the Trustee provided incorrect information about the application of the state pension deduction (the **Deduction**) to her pension entitlement.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against the Trustee because there has been no maladministration. The Trustee has dealt with Mrs Crawford's pension in accordance with the Scheme rules, which states that her state pension age (**SPA**) is her 60th birthday. In addition, the Trustee did not provide her with inaccurate or misleading information.

DETAILED DETERMINATION

Material Facts

1. Mrs Crawford's date of birth is 3 March 1955. She was employed by Marks and Spencer (the **Company**), but left their employment in 7 June 1986. During this time she was a member of the Scheme. Once Mrs Crawford 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 Mrs Crawford left employment in 1986, the Rules then in force were set out in a Trust Deed and Rules dated 7 August 1984 (**the 1984 Rules**).
3. Rule 5(a) of the 1984 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 full yearly rate... of the basic component of the Category A retirement pension described in the Social Security Act 1975 payable from pensionable age for a single person who fully satisfies the relevant contribution conditions."
5. Rule 5(a) also said that the total amount to be deducted
"... shall not exceed the yearly rate... of the basic component of the Category A retirement pension described in the Social Security Act 1975 payable from pensionable age for a single person... and provided further that the reduction in the amount of the yearly pension due to the State Pension Deduction shall be ignored until the Member reaches pensionable age."
6. Under Rule 15, a deferred member with more than five years' service was entitled to a deferred pension when they reached Normal Retirement Date or pensionable age, whichever was earlier. This would be calculated in the same way as if Rule 5 applied, but with reference to their final pensionable salary at the date of leaving employment (though with a deduction for early payment).

7. The Normal Retirement Date under the Scheme was age 65 for men and age 60 for women.
8. The effect of the Rules was that where a member received their pension under the Scheme before reaching state pension age (**SPA**) they would receive their pension in full, but once the member started 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.
9. The 1984 Rules were amended by a Supplemental Deed date 25 November 1988 (**the 1988 Rules**), but those amendments did not affect Rule 5 or the definitions set out above.
10. The Social Security Act 1975 defined “pensionable age” as “in the case of a man, 65; in the case of a woman, 60.”
11. Mrs Crawford was sent a certificate by the Trustee when she left the service of the Company in 1986 which sets out her entitlement under the Scheme. The certificate stated that her normal retirement date was 1 April 2015. There was nothing in the certificate to inform her about the reduction to her pension when she reaches SPA.
12. A letter from the Trustee dated 16 February 2011 to Mrs Crawford quotes her an estimate of the pension, before and after taking a tax-free lump sum, payable to her from 31 March 2015 and says that the pension she chooses will be reduced by the Deduction when she reaches SPA. The letter did not define what her SPA was.
13. On 26 August 2011 the Trustee wrote to Mrs Crawford saying that she may have received a retirement quotation advising that if she drew her pension early, it would reduce from 6 January 2020. It explained that as a result of the government’s proposals to change the SPA, it had reviewed how the Deduction is to be applied to her pension. The review revealed that part of the Deduction should be applied when she reaches age 60 and not 6 January 2020. It said that this was not a change to the Scheme as both it and the Company are committed to paying benefits in accordance with the Rules. It apologised for providing her with incorrect information regarding the timing of the Deduction.

14. Mrs Crawford complained to the Trustee about the date on when the Deduction is to be applied to her pension. The Trustee responded to her by requesting further information about whether she had relied on the information she received and the actual financial loss she has suffered. It asked for details of specific financial transactions she had entered into at the time of or in anticipation of when she intended to take her pension from the Scheme.
15. On 17 December 2011 Mrs Crawford responded to the Trustee stating:
 - She did not believe that it was right to make the Deduction until SPA. She also did not believe that it was ever the intention when the Rules were written for this to be the case.
 - She enclosed a copy of a Scheme booklet dated January 1984 and point out that it stated “For those male employees with a normal retirement age 60, no adjustment for state pension until the state retirement age is reached”. This meant that if she were a male employee retiring at 60, no deduction would be made until she reached SPA. She believed that making the Deduction earlier than SPA because she is a female employee with a normal retirement age of 60, would clearly be sexual discrimination. The booklet also refers to the Deduction being made at SPA.
 - The change to the female SPA was in 1995. At no time between then and August 2011 did it write to her telling her that the Deduction would be applied before her SPA. The Trustee ‘omitted to act’ since it did not inform at any time in the last 16 years that the Deduction would be applied earlier than explained in the booklet.
 - If she had been informed earlier, she would have made provisions, but it is too late now to make up lost ground. Prior to her husband’s recent retirement they were a dual income family, so now their income has reduced.
 - She would have had 16 years to make provisions through extra pension contributions which would have been relatively small compared to the contributions which would now be required.

- She does not accept that the expectation of a payment is not enough to demonstrate financial loss. The very fact that she would not receive the amount of pension she had been led to believe she would receive, in her view, demonstrates financial loss.
 - It would have been irresponsible for her to have spent money that she had not received, but all her financial planning and expenditure on retirement provision would have been made on the basis of this expectation. She cannot now recover the money which she had spent over the past 16 years and which would have been used to make up the deficit in her expected income.
16. The Trustee dealt with her complaint under the Scheme's internal dispute resolution procedures (**IDRP**). It confirmed that she was receiving her correct entitlement under the Rules. With regard to her point on discrimination, it took legal advice as to whether the basis on which the Scheme was being administered amounted to unlawful discrimination on grounds of sex and is satisfied that this was not the case. It could see how she may have expected the deduction date to have changed in view of its letter of 16 February 2011. It recognised that this letter could, with hindsight, have given the actual deduction date, ie in her case age 60 as opposed to just stating that the Deduction would occur at SPA. It apologised that this was not clearly set out in the letter. It was noted that she was not prepared to provide information on income and expenditure which it thought would have been helpful in looking at her case. However, taking all the information she gave into account, it did not feel that she had demonstrated either reliance or actual financial loss.
17. Mrs Crawford is not as yet in receipt of her pension from the Scheme, which will be payable as from 1 April 2015.

Summary of Mrs Crawford's position

18. Although at the time she left the Scheme, in June 1986, her SPA was 60 and it was expected that the Deduction would be made as from age 60, the Rules were amended by a Deed dated 6 May 1998.

19. Under the 1998 Rules the definition of SPA was amended and this together with the provisions of rules 16.2 and 16.5 meant that the Deduction would not be applied until she reached her revised SPA, ie 64 years nine months, as originally envisaged by the Pensions Act 1995.
20. This was consistent with the Scheme explanatory booklet dated April 1997 which, although by that date she had left the Company, applies equally to her as it was stated to be a guide to permanent staff engaged up to and including 31 December 1995. The booklet informed members that if they retired before SPA, there would be a gap between the start of their pension from the Scheme and start of their state basic pension. Members were advised that *"The Scheme will bridge this gap by paying you your M&S pension without any reduction for the Basic State Pension until you reached State Pension Age"*.
21. The booklet also advised members that the SPA would eventually be age 65 for everyone and suggested women born after 6 April 1950 should check with the local DSS to find out what their revised SPA would be.
22. In the letter dated 16 February 2011 she received an illustration of the benefits payable from 31 March 2015 in which she was advised that the Deduction would be applied from her revised SPA. Although this letter did not define what her SPA was, it clearly suggested this to be later than her 60th birthday otherwise there would have been no need for two sets of figures, ie the full pension from 31 March 2015 and then a reduction when she reaches SPA. If her SPA had been defined, then the additional information about the reduction at SPA would have been irrelevant. She therefore believes that this clearly suggests that the Trustee was assuming a SPA of 6 January 2020. This is supported by its letter of 24 August 2011, which does give a specific date for the SPA.
23. She believes that the determination for Mrs Thew does not fully address all the points she raised in her complaint and there is no reference to the application of the 1998 Rules.
24. She says that as she was in the management category when she left the Company, the Normal Retirement Date under the Scheme should be 60 for both men and

women. She does not feel that the Normal Retirement Date for non-management members apply to her.

25. She feels that even at the time she left the Company there was a clear intention for the deduction only to be made to offset the state pension actually being paid. This is illustrated by the fact that a male colleague doing the same work as her, and also retiring at 60, would not have the deduction made until age 65. This was clarified in the 1998 Rules when it was realised that actual SPA was not going to be as originally envisaged.
26. With regard to the letter of 24 August 2011 it is clear that prior to the review referred to in that letter, the Trustee believed the Deduction would only apply from her revised SPA.
27. Since the 1998 Rules there have been several deeds completed but the only deed which specifically affects the date from which the Deduction would be applied is the deed dated 20 September 2011. This deed introduced by way of clarification a new definition of "Pension Age" which if applied to her would mean the Deduction would be applied in part from age 60, and in part from May 2018. She believes that the terms of the 1998 Rules gave her a subsisting right for the Deduction not to be applied until her revised SPA of 30 November 2020, and to do so would be in contravention of clause 4 of the 2011 Deed and would breach her subsisting right.

Summary of the Trustee's position

28. Mrs Crawford left service on 7 June 1986 and her entitlement to benefits is governed by the Rules in force at the date when she left service – ie the 1984 Rules. The 1988 Rules also apply, but did not make any changes in her particular case. These provide that the Deduction should be applied at "State Pension Age". In respect of pension attributable to pensionable service before 17 May 1990, this is age 60. In respect of pension attributable to pensionable service on or after this date, this is 64 and 11 months.
29. The Rules have since been amended at various times. In general, subsequent versions of the Rules are stated to have no effect on the calculation of benefits in respect of previous leavers.

30. In 2011, in light of government changes to the state pension age, the Trustee and the Company undertook a review of the effect of those changes to state pension age on the Scheme's state pension age, and took legal advice on this. It concluded that the correct position was as follows:
- (a) where the Rules define the Scheme's state pension age by reference to statutory provisions, they should be construed by reference to legislation in force as at their date, unless the Rules specifically provide otherwise;
 - (b) in some cases the Rules specifically refer to a designated age as the Scheme's state pension age;
 - (c) the Trustee must, however, ensure that all benefits attributable to service from 17 May 1990 comply with the equalisation requirements imposed by the Barber judgment.
31. The Trustee and the Company entered into a Deed confirming this position in 2011.
32. As stated above, Mrs Crawford's benefits are governed by the 1984 and 1988 Rules. These Rules provide that the Deduction should be applied at "State Pension Age", which is defined as age 60 for women. There is no statutory reference included in the definition of "State Pension Age".
33. Mrs Crawford has complained that it should have informed her of the change to the Deduction before 2011. As stated above, with the Company it entered into the 2011 Deed to confirm the position under the Rules in force at that date, including the application of the 1998 Rules to relevant members. The 2011 Deed did not, in itself, make a change to her entitlement under the Rules. Therefore, there has been no change to the amount of pension she is legally entitled to.
34. It acknowledges that Mrs Crawford had been provided with correspondence which stated that the Deduction would be applied from her SPA. However, the provision of incorrect, incomplete or misleading information does not give rise to an entitlement. A member is only entitled to the pension due to them in accordance with the Rules; it has no power to confer benefits in excess of those under the Rules. The

documents were all summary documents and could not reasonably be expected to confer any entitlement.

35. The Company did have power to confer benefits in excess of the Rules, via discretionary benefits/augmentation provisions. However, there is no evidence that the Company has used such power in her case. Therefore, it does not agree that the provision of incorrect information on retirement amounts to a contractual obligation which it is obliged to honour.
36. 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.
37. Mrs Crawford was invited to provide evidence supporting her claim to have acted in reliance upon the information provided to her. However, she did not provide any evidence to support this claim or of any actual financial loss suffered.

Conclusions

38. I agree with Mrs Crawford that in respect of her case, the Normal Retirement Date under the Scheme should be that which applies to management staff members and not non-management staff members. This date is the same under both these categories for women, ie 60th birthday, so it does not matter which category she falls into. In addition, as the reduction is applied from her SPA her Normal Retirement Date is irrelevant.
39. This is one of a number of complaints brought by female members of the Scheme about the date when the Deduction will be made.
40. 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.

41. 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 SPAs in force at that time and it was then permissible to have different pension ages for men and women.
42. 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.
43. For members who left service before 17 May 1990, the Scheme applies the Deduction at age 60 for women and 65 for men.
44. What was not foreseen at the time was that there would be further changes to SPA; 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 SPA 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).
45. 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 Mrs Crawford now has a SPA of 66 and will receive her basic state pension in March 2021. The result of this is that the Deduction will be made in 2015 when she reaches age 60. So there will be a gap of just about six years when her Scheme pension will be reduced but she will not yet be receiving her basic state pension.
46. Mrs Crawford 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 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.

47. It follows from my conclusion in Mrs Thew's complaint that Mrs Crawford'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.
48. This question turns on the definition of SPA and, thus, the date at which the Deduction should be applied. Mrs Crawford 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.
49. 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.
50. 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 Mrs Crawford's situation, the Deduction is not to be taken until the Member reaches SPA.
51. That leads to the next question, which is what her SPA is.
52. The Trustee says that the reference should be interpreted as being to the state pension arrangements in force at the time of the 1984 Deed – in other words, age 60. The Trustee relies on Rule 5(a) of the 1984 Rules, which refers to a member reaching pensionable age. "Pensionable age" is defined in accordance with the Social Security Act 1975 as, for a woman, age 60.
53. 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.

54. However, Mrs Crawford left service in June 1986. She then became a deferred member and her benefits crystallised then. She was entitled to a deferred pension under Rule 15, which would be paid to her when she reaches Normal Retirement Date or pensionable age, whichever was earlier. At that point, her pensionable age was defined in Rule 5 of the 1984 Rules – in other words the pension payable from pensionable age under the Social Security Act 1975. That Act defined pensionable age for a woman as age 60.
55. So, the 1984 Rules make it clear that her pensionable age is 60 as defined by the Social Security Act 1975. It follows that at the point Mrs Crawford left and became a deferred member in 1990 her pensionable age – both for the state pension and for the purposes of this Scheme – was 60. It was not, at that point, discriminatory to have different pension ages for men and women.
56. 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. Mrs Crawford became entitled to this at age 60. Accordingly, the Trustee is correct to say that is the relevant age.
57. Mrs Crawford says that 1998 Rules gave her existing right for the Deduction not to be applied until January 2020, and to apply part of the Deduction before that date would be in contravention of clause 4 of the 2011 Rules and would breach her subsisting right.
58. The 2011 Rules say that the relevant meaning is as originally enacted in the Pensions Act 1995. On that basis, Mrs Crawford’s SPA would again be 60. However, those Rules were to be for clarification only and to have effect only so far as they do not adversely affect any subsisting rights. So what were her existing rights?

59. Mrs Crawford's existing right under the 1984 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 60.
60. 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 Deduction is not written in terms that require it automatically to track any later changes in the state pension.
61. There has been no 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 60. 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.
62. I therefore find that the Trustee has dealt with Mrs Crawford'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.
63. The explanatory booklet to the Scheme refers to the Deduction taking effect from the date the member reaches SPA. It states that SPA is 60 for females and 65 for males.
64. 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.
65. The statement sent to Mrs Crawford when she left the service of the Company in 1986 does not say anything about the Deduction.
66. Mrs Crawford says that the letter of 16 February 2011 clearly suggests that the Trustee was assuming a SPA of 6 January 2020. This letter states that the Deduction will be made when she reaches SPA, but does not define this date. The fact that the letter quotes the pension payable to her from 31 March 2015 and then says that the chosen pension will be reduced when she reaches SPA, does not imply

to me that the Trustee was assuming a SPA of 6 January 2020. The information about the Deduction applying at SPA, was simply to clarify that the pension figures quoted would be reduced once she reached SPA. In my view, if the Trustee was assuming a different date from 31 March 2015, it would have said so. I can see no correspondence or other communications from the Trustee which states that the Deduction will be made in January 2020. On balance, I am unable to find that she was given misleading information and therefore there is no maladministration.

67. Even if Mrs Crawford was provided with incorrect information, which she was not, she would need to show that she relied on the information to her detriment and pursue a claim in respect of any loss she has suffered as a result. The Trustee considered the evidence provided by her under IDRP but concluded that she had not demonstrated either reliance or actual financial loss.
68. Mrs Crawford has not as yet decided to take her benefits from the Scheme. So rather than suffering a reduction in the pension she is receiving, her complaint is that her pension, when she eventually takes it, will be lower than the pension she is expecting to receive, i.e. a loss of expectation rather than a financial loss.
69. In my judgment, Mrs Crawford has not demonstrated that she has been provided with incorrect information or that she has suffered a loss of income. I am therefore unable to find that there was maladministration on the part of the Trustee and I do not uphold her complaint.

Jane Irvine
Deputy Pensions Ombudsman

26 January 2015