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

Applicant	Dr Hugh Levinson
Scheme	EMI Group Pension Fund (**the Fund**)
Respondent(s)	EMI Group Pension Trustees Limited (**the Trustee**)

Subject

Dr Levinson has complained about the change to the method and late retirement factors used to calculate his late retirement pension and that he was not informed of the change before or after it occurred.

Dr Levinson had received quotations of his late retirement pension at specific times after his normal retirement date but following a revision to the method of how a late retirement pension is calculated, the new quotation he received in September 2013 was lower than before. He believes he has been misled and that the previous basis on which he decided to defer his pension after normal retirement date should be continued.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be partially upheld against the Trustee. The benefits have been calculated in accordance with the rules and there was no requirement to inform members of a change to the method for calculating the late retirement increase or factors either before or after the change occurred. However Dr Levinson was misled over how the pension would increase in late retirement and as a result he has suffered a loss of expectation for which he should be compensated. I therefore direct that the Trustee should pay Dr Levinson £500 for this loss of expectation and the distress and inconvenience he has suffered.

DETAILED DETERMINATION

Material Facts

1. Dr Levinson left employment with EMI on 30 June 1999 and was entitled to a deferred pension payable from his normal pension age of 60 on 21 May 2006.

2. Dr Levinson received a statement from the administrators on 22 May 2006 which was headed "An update of your Deferred Entitlement from the EMI Group Pension Fund" and said that he was entitled to a pension from age 60 of £9,442.53 per annum. The statement also said "If you defer drawing pension the £9,442.53 per annum increases during the period of deferment."

3. Page 5 of the Deferred Entitlement statement set out how the pension of £9,442.53 per annum had been calculated and gave information on how the pension would increase if Dr Levinson decided not to start drawing it from age 60 and is reproduced in the Appendix. The statement said that his pension of £9,442.53 per annum would increase by

   "(a) 1/12th of 5%* for each complete month of deferment plus

   (b) the lower of (i) the increase in RPI in the previous year and (ii) 5%"

4. As Dr Levinson was still working he decided to defer drawing his pension. On 9 March 2011 the Fund administrators wrote to Dr Levinson and said that as he was approaching the normal retirement date of 21 May 2011 (his 65th birthday) they were sending a summary of benefits and how to claim them.

5. The Retirement Statement set out the options available for retirement from 21 May 2011 as a pension of £14,160.48 a year or a lump sum and a reduced pension. The statement also contained a section on page 2 entitled Important Notes and at the bottom of that page it said in bold "**All of the benefits mentioned in this Statement are subject to the Trust Deed and Rules of the Fund**".

6. In August 2012 Dr Levinson received a letter from the Chairman of the Trustee regarding the agreement of the Company's owners Citigroup to inject more money into the Fund. The key features of that agreement were an immediate payment of £240 million into the Fund, agreement to buy-out the benefits for all members in full with an insurance company within five years and a new Principal Employer for the Fund, whose obligations were guaranteed by Citigroup Inc.

7. On 9 October 2012 the administrators sent Dr Levinson a further retirement statement with a retirement date of 21 October 2012 and showing a pension payable of £17,744.15 a year.

8. In July 2013 Dr Levinson received a letter again from the Chairman of the Trustee to confirm that agreement had been reached to secure all benefits with Pension Insurance Corporation.

9. Dr Levinson requested a further retirement statement in the summer of 2013 as he was now working part-time. On 2 September 2013 the administrators sent a new statement for retirement from 21 October 2013 and showing a pension payable of £15,371.71 a year. As this was lower than the £17,744.15 a year pension quoted in October 2012 Dr Levinson contacted the administrators to query the reduction. He was informed that this was due to a change in the late retirement factors.

10. As Dr Levinson was not satisfied with the answers he got to his further questions and after going through the Internal Dispute Resolution Procedure brought his complaint to this office.

The Fund Rules

11. Rule 4.2 of the Trust Deed and Rules dated 22 March 1983 says the following in respect of late retirement:

> "(1) A member who having remained in service after pension date ceases to be in service shall be entitled to a pension commencing on the day following such cessation and continuing during the remainder of his life
>
> (2) The yearly amount of the pension payable under 4.2 (1) shall be the smaller of the relevant maximum and that of the pension to which he would have been entitled if he had ceased to be in service at pension date increased by such amount as the Trustee after consulting the actuary determines to be appropriate"

12. Rule 4.5 (3)(iii) of the Trust Deed and Rules dated 4 October 1999 says:

> "if the pension begins after the day following Pension Date its amount shall be increased by such amount (if any) as the Trustee (after consulting the Actuary) determines to be appropriate"

Summary of Dr Levinson's position

Dr Levinson has asked for details and copies of the Rules which allowed the calculation method and factors to be changed and cover his situation. The Rules dated 4 October 1999 have a disclaimer on the first page which says:

> "Sections 2 to 5 of the Rules (together with the definitions relevant to those Sections in Section 1) set out the benefit structure applicable to and in respect of Members in Service on or after 4 October 1999. Different

benefits may be applicable to and in respect of Members who left before that date."

13. As Dr Levinson left service before 4 October 1999 these Rules would not be applicable to him. The Trustee has provided a copy of the Thorn EMI Rules dated 22 March 1983 but Dr Levinson was contributing from 1 June 1985 to 30 June 1999.

14. Dr Levinson says that the Deferred Entitlement Statement he received in 2006 set out clearly the manner by which his pension would increase in late retirement. There were no qualifications that the benefits were subject to the Trust Deed and Rules. Furthermore Dr Levinson does not see where the wording of Rule 4.5 (3) (iii) allows the Trustee to backdate the calculations to age 60, ignoring and overriding the earlier calculation method.

15. Dr Levinson has noted from the report on factors produced by the Actuary that he recommended a change to the method for calculating the late retirement increase. This was to bring the calculation method into line with the expectation that the benefits would be secured with an insurance company within five years.

16. Also following input from the Pensions Advisory Service he believes that the Trustee has a legal duty to disclose the change in the late retirement pension calculation method from annual compounding of all components and this may also be a material alteration under the Disclosure of Information Regulations. Dr Levinson also says that the Trustee should not be allowed to change the method retrospectively and they have failed to carry out their general trustee duties of care and acting in his best interests. If he had been given prior notice of the change then he would have been able to assess the best course of action.

17. Dr Levinson has also noted from the meeting minutes supplied that the Actuary deliberately took the more pessimistic short term view of investments, due to the apparent need to wrap up the transfer in the shortest period of time.

18. There was also a deliberate withholding from pensioners of critical information on the effects of the agreement the Trustee had forged with Citigroup and PIC, which would adversely affect the deferred pensioners (late retirees).

Summary of Trustee's position

19. The starting point in calculating the benefits for Dr Levinson is the deferred pension that he was entitled to at the date of leaving. This pension is then revalued to the date at which it could have been paid to the member without actuarial reduction (which for Dr Levinson was age 60). Having calculated this benefit, the increases that

this pension would have accrued between age 60 and the date of payment are then added. Finally, a late retirement factor is added to the benefit to reflect the fact it is coming into payment at a later date. This late retirement factor for Dr Levinson applies from age 60 until the date on which the pension comes into payment.

20. The late retirement factors used by the Fund are reviewed from time to time by the Fund Actuary to ensure they remain reasonable and to meet the particular circumstances of the Fund at any time. The Actuary conducted a review of the factors in late 2012 and made recommendations to the Trustee in March 2013. Having considered the Actuary's recommendations, the Trustee adopted the Actuary's recommended late retirement increase basis and factors with effect from 1 April 2013.

Conclusions

21. It does appear to me that there has been some confusion over the terms that have been used in this case and I believe it appropriate if I just define the membership status and terms for identifying Dr Levinson's status during the period between leaving the company and drawing his pension. The status is as follows:

Deferred pensioner – for the period between leaving EMI and pension age (age 60)

Late retiree – period between pension age and drawing pension

Pensioner - drawing pension.

22. The main areas of concern are what additional benefit should be provided by the Fund for the period that Dr Levinson was a late retiree and is this consistent with the Rules.

23. I will deal firstly with the question of the Rules and whether Dr Levinson is covered by the Rules dated 4 October 1999 (**the 1999 Rules**). Dr Levinson says that the disclaimer on page 1 excludes him from being covered by the 1999 Rules. I do not agree as I conclude that the disclaimer simply confirms that the 1999 Rules cover the benefits for members in service on or after 4 October 1999. It does not mean that members who were not in service on that day are excluded as indeed the disclaimer goes on to say "different benefits may be applicable to and in respect of Members who left before that date." The 1999 Rules are also referred to as the consolidated rule which means that all the previous rules have been combined into the one document. I therefore find that Dr Levinson is covered by the Rules dated 4 October 1999.

24. Rule 4.5 (3)(iii) of the Trust Deed and Rules dated 4 October 1999 is quite clear that on late retirement the pension "shall be increased by such amount (if any) as the Trustee (after consulting the Actuary) determines to be appropriate." The Trustee therefore has the power to apply a late retirement increase in whatever manner it decides subject to receiving appropriate advice from the Actuary. There is no prescribed manner or method for calculating the late retirement increase and the 1999 Rules do not say that notice has to be given to members or that a change in the method of calculating the late retirement increase or factors can only be a future change.

25. The 1999 Rules in effect say that the member's right to a late retirement increase is at a rate to be decided by the Trustee on advice from the Actuary. It is not an entitlement or an accrued right until the member actually draws his pension and the relevant late retirement benefit calculation has been performed. So a change in the way a late retirement increase or late retirement factors are calculated for someone who is yet to draw his pension is not a change to an accrued right.

26. I have also looked at the previous Rules dated 22 March 1983 and see that the basis for calculating the late retirement increase has remained consistent as both say that the pension will be increased by such amount as the Trustee after consulting the Actuary determines to be appropriate.

27. There is no suggestion that the pension figures that Dr Levinson was sent in October 2012 were inaccurate. They were based on the late retirement factors and method applicable at that time. The two questions that have been posed is whether the manner in which the late retirement increase was calculated in September 2013 was correct and whether Dr Levinson should have been informed of a change to the late retirement factors. Dr Levinson has said that there would have been a statutory duty to do so.

28. On the first of these questions it is clear from the 1999 Rules that the Trustee has the power to amend the way the late retirement increase and factors are calculated subject to advice from the Actuary. It is a common practice to review the factors after an actuarial valuation.

29. Dr Levinson had however built up an expectation that his benefits would increase at a compound rate of increase as outlined in the Deferred Entitlement Statement issued in May 2006. The 2006 statement was however, in my view, deficient in a couple of areas as it did not say that the benefits were subject to the Trust Deed and

Rules or that the late increase basis could be changed. Dr Levinson decided to become a late retiree and expected that his pension would increase in line with the increase basis outlined in the 2006 statement.

30. Dr Levinson received a further Retirement Statement in March 2011 which set out the pension options available if he were to draw his pension from his 65th birthday. The calculation method used to calculate the late retirement increase for the pension figures quoted to Dr Levinson in March 2012 was a straightforward compound rate based on the method outlined in the 2006 Deferred Entitlement statement. This statement did clearly state that the benefits were subject to the Trust Deed and Rules of the Fund.

31. The calculation method used to calculate the late retirement increase for the pension figures quoted to Dr Levinson in May 2006 was a straightforward compound rate of increase. A new basis for calculating the late retirement increase was introduced from April 2013 described as a ‘rolled up back payment’ method and this was the method in force when Dr Levinson decided to take his benefits in October 2013. I can understand Dr Levinson’s surprise and disappointment when he received details of the lower pension that would be payable from October 2013. The pension was however calculated in accordance with the 1999 Rules and the Trustee was able to change the method by which the late retirement increase is calculated. There is no rigid method of calculation that must be adopted by a pension scheme and it was for the Trustee to agree the method and basis to be used.

32. The Actuary recommended changes to reflect the lower investment return assumed and the expectation that the benefits would be insured with an insurer within five years. Dr Levinson has said that the Actuary deliberately took the more pessimistic short term view of investments, due to the apparent need to wrap up the transfer in the shortest period of time. I can see no evidence that the Actuary was influenced by any other factors or indeed that this was a pessimistic short term view of investments, the recommendation to use a lower rate of investment return was based on his professional opinion.

33. There is no statutory duty to inform members of a change to the method by which a late retirement increase or late retirement factors are calculated. There is no such requirement within the occupational pension disclosure regulations. There are some instances where members must be informed and consulted on “listed changes” to a pension scheme – which are contained in the Occupational and Personal Pension

Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 – but a change in how the late retirement increase or factors are calculated is not one of the listed changes.

34. Dr Levinson has questioned whether the change made was legal and should apply retrospectively. I do not find that the changes made fall foul of any statutory legislation. The quotation issued to Dr Levinson in October 2012 was calculated specifically for retirement from 21 October 2012 and took into account the late retirement factors and method then in place. The statement did not mean that Dr Levinson had built up an accrued right to that level of pension or that retirement on a later date would produce a bigger pension.

35. Dr Levinson had an expectation that the pension he would receive would be higher, based partly on the misleading information on how the pension in late retirement would be calculated and the previous quotations he had received. However the pension figures quoted for retirement from 21 October 2012 were only applicable if he retired on that date. He has therefore suffered a loss of expectation and not an actual loss of income. It would have been distressing to have been informed that the amount he was entitled to receive was lower and I shall therefore direct the Trustee to make a payment to compensate for the distress caused. Any award is to reflect this distress and not to compensate for any perceived loss of pension.

36. Dr Levinson has also questioned whether the Trustee has carried out its general duty of care to him and acted in his best interests. Dr Levinson has suggested that if he had been notified of the change then he would have been able to assess the situation and presumably elect to take his pension earlier. The Trustee does have a duty of care but must also act in the best interests of all the members. There were a number of changes to all of the underlying factors within the Scheme and the Trustee was not required to announce any of these changes.

37. Finally Dr Levinson has raised the possibility of the deliberate withholding from pensioners of critical information on the effects of the agreement the Trustee had forged with Citigroup and Pension Insurance Corporation, which would adversely affect the deferred pensioners (i.e. late retirees). The Trustee has strongly denied any such accusation. I can see no evidence of any such intent or actual withholding of information from Dr Levinson. The Trustee was not obliged to give any notice of the change to the late retirement calculation method or basis and I do not expect the

number of members in late retirement would have had a critical impact on the discussions regarding the buy-out of the Fund.

Directions

38. I direct that within 28 days the Trustee make a payment to Dr Levinson of £500 in respect of the distress and inconvenience caused to him.

Jane Irvine
Deputy Pensions Ombudsman

19 December 2014

Appendix

Calculation of your current deferred entitlement

	Original Entitlement £	Increase so far	Current Entitlement £
Your GMP	1911.00	33.74%*	2555.80
The excess over your GMP	5860.65	17.50%**	6686.73
	£2161.06		£9442.53

** Increases making up this figure

1 April 2000	1.35 (9 months @ 1.8% for a full year)
1 April 2001	2.90
1 April 2002	0.70
1 April 2003	2.90
1 April 2004	2.80
1 April 2005	3.50
1 April 2006	2.20

Subsequent annual increases to your GMP and the Excess over your GM, while you defer drawing your pension, will be in April each year as follows:
(a) 1/12th of 5%* for each complete month of deferment plus
(b) the lower of (i) the increase in RPI in the previous year and (ii) 5%

For how the pension increases when it comes into payment see page 3.

*The rate of increase depends on interest rates prevailing at the time and is therefore subject to change."